—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW-YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

MARY E. HEAD, *Defendant in Error.*

No. 254

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GARDNER LATHROP,
CYRUS CRANE,
O. W. PRATT,
Solicitors for Plaintiff in Error.

JAMES H. McINTOSH,
Of Counsel.

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MAY IT PLEASE THE COURT,—

Counsel for Head in their brief have made so many claims for us we do not make for ourselves and have so far missed the claims made by us that in order to avoid any chance of a misunderstanding, I have thought I ought, by way of reply, to summarize both the facts and the law as we understand them.

Summary of the Facts.

I.

Head, a citizen of New Mexico, domiciled at Watrous, and the New-York Life Insurance Company, a citizen of New York, domiciled at New York City, met in another state and

made a contract with each other. The state they met in happened to be Missouri, but in their negotiations they took this fact into account and disposed of it by agreeing that their contract should (p. 28) "be construed according to the laws of the State of New York, the place of said contract being agreed to be the Home Office of said Company in the City of New York".

II.

Their contract of life insurance called for the annual payment of premiums (p. 24) "at the Home Office of the Company". Each paid premium gave accumulated value to the policy. After the payment of five premiums the insured might borrow its accumulated value, provided (p. 23) "the policy shall be duly assigned to the Company as collateral security for the loans and deposited at the Home Office".

III.

April 3, 1904, Head obtained the maximum loan on the policy and duly assigned the policy to the Company as collateral security for the loan and deposited it at the Home Office. The loan was evidenced by a loan agreement which provided (p. 81),—

> "If any premium on said policy or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with Section 88, Chapter 690 of the Laws of 1892 of the State of New York."

IV.

The premium due April 3, 1905, was not paid. The policy provides for non-forfeiture benefits (p. 26) in the event of non-payment of premium, but these benefits are only available (p. 38) "Provided there is no indebtedness against the

policy. (Pursuant to the Insurance Law, Chapter 690, Laws of 1892 of the State of New York.)''

V.

After said non-payment of premium, the Company duly endorsed the policy for its full value in paid-up insurance after deducting the indebtedness from the reserve, all in strict accord with "The Insurance Law, Chapter 690, Laws of 1892 of the State of New York", (p. 54) Section 88, and sent the endorsed policy to the owners of it. When it received proofs of death it duly tendered payment of the amount of this paid-up insurance.

VI.

That the Company has offered to perform this contract according to its terms as contained in the policy and in strict accord with the laws of New York, is not disputed. Notwithstanding the due cancelation of this debt and of the policy, and its endorsement for paid-up insurance and its return as so endorsed, Head has recovered the full face of the policy, less the amount of the loan, on the ground that a non-forfeiture law of Missouri which, as construed by the Missouri courts, differs from the non-forfeiture law of New York, replaces and supersedes the non-forfeiture provisions of the policy and of the Laws of New York, and controls the rights of the parties in spite of themselves because they happened to meet in Missouri when they made the contract, although they were both non-residents of Missouri, one domiciled in New Mexico and the other in New York, and agreed in their contract that it should be governed by the laws of the domicile of one of them, namely by the laws of New York.

SUMMARY OF THE LAW.

I.

The agreement in the policy, that in case of a loan "The policy shall be duly assigned to the Company as collateral security for the loans and deposited at the Home Office", necessarily implies and requires the pledge of the policy upon such terms and conditions as shall make the Company secure and give it the right to satisfy the debt by foreclosing the pledge in a proper case.

II.

The Missouri statute as construed by the Missouri court in the *Smith* and *Burridge* cases and in this case, is unconstitutional because,—

1. It deprives the owner of the policy of the right

(a) To make such proper use of it as he sees fit; or

(b) To dispose of it upon such terms and under such conditions as may be satisfactory to him.

2. It deprives the Company as a money-lender of the right

(a) To take adequate collateral security for money loaned; or

(b) To enforce the collateral security contract.

3. It denies the Company the equal protection of the law, because it does not accord to it as a money-lender the same rights and remedies accorded to every other money-lender.

Suppose the policy-holder, instead of borrowing money from the Company had borrowed from some other money-lender, say a Bank, and had duly assigned the policy as collateral security, authorizing the lender in the event of default to foreclose the security by charging the debt against the reserve on the policy and paying the debtor the excess, if any,—would this be a violation of the Missouri Statute? Not at all.

But this same agreement made with the Company as a money-lender the Missouri Court holds is contrary to the statute and void.

In other words, the policy-holder may use the value of the policy to secure or pay a debt in dealing with any person except the Company. But in dealing with the Company he cannot use the value of the policy to secure or pay a debt to it unless, and only unless, the debt was incurred for money borrowed to pay premiums on the policy.

4. It deprives the Company of its property without due process of law by compelling it to give the policy-holder extended insurance for money which the policy-holder has already obtained from it.

5. It violates the constitutional guaranty of liberty by prohibiting the policy-holder from making a proper use of his own property, and the Company from collecting its debt.

Allgeyer v. Louisiana, 165 U. S., 580.

Adair v. United States, 208 U. S., 161.

Lawton v. Steele, 152 U. S., 137.

6. The Missouri statute as so construed cannot be justified as an exercise of the police power, because it imposes unusual and unnecessary restrictions upon the natural right of both parties to make with each other and to enforce a contract that is fair, just and proper in all its terms.

Lawton v. Steele, 152 U. S., 137.

Adair v. United States, 208 U. S., 161.

Lochner v. New York, 198 U. S., 46.

Zellmer v. Krentzberg, 114 Wis., 530.

7. It is no answer to say that Missouri may impose any conditions it pleases on the right of a foreign corporation to do business in the State. For,—

(a) This is not a statute relating to foreign corporations alone, or imposing conditions for doing business in the

State. It is a general statute applying to all life insurance corporations. Every disability this statute as so construed imposes on the parties to this contract it also imposes upon the parties to a like contract if made between a Missouri corporation and a resident of that State.

(b) But in any event the right to impose conditions upon a foreign corporation relates to the doing of business in the State with the citizenship thereof. If a representative of a foreign corporation happens to meet a resident of another State in Ohio, the State of Ohio has no power that I know of to keep them from dealing with each other in any proper way they please, unless the transaction is about property located in Ohio.

III.

The rule that impresses the public policy of a State upon contracts made therein, relates only to contracts to which a resident or citizen of the State is a party. The public policy of a State, in so far as it impresses itself upon contracts, is for the benefit and protection of residents and citizens of the State and has nothing to do with residents and citizens of other States.

IV.

Head of New Mexico and the Company of New York in dealing with each other anywhere had a perfect right to agree with each other that their engagements should be controlled by the laws of the domicile of one of them to the exclusion of the laws of Missouri where neither was domiciled.

V.

The loan agreement Head signed in New Mexico and mailed it and the policy to New York; in exchange for them he received (p. 70) "this third day of April, 1904, the sum of twenty-two hundred and seventy dollars from the New-York Life Insurance Company at the City of New York."

This anyhow was not a Missouri transaction. Under the laws of New Mexico and of New York it was a valid and proper contract of commercial pledge. Head thereby having duly pledged his policy with the Company at New York as collateral security for a loan, and the Company having duly foreclosed this commercial pledge, all in strict accord with the contract and to the laws of New Mexico and of New York, the transaction thereby ended, except as the results of the pledge foreclosure gave Head paid-up insurance. The laws of Missouri cannot now come into such a commercial transaction, go behind it, and breathe vitality into a policy which the parties to the contract had duly closed out by the one paying and the other receiving its full value.

Respectfully submitted,

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JAS. H. MCINTOSH,
Of Counsel.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, *Plaintiff in Error,*
vs.
MARY E. HEAD, *Defendant in Error.*
Number 254.

Statement and Brief of Plaintiff in Error in Opposition to Motion to Dismiss.

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—IN THE—

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vs.
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Number 254.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

This motion to dismiss is presented only a short time before the case will be reached for hearing on the merits. Although it might have been presented long ago, it has been delayed until the present time, after plaintiff in error has made the necessary deposit to secure the printing of the record and before such printed record is available for the use of either counsel or the court. This case will be reached for hearing on the merits probably in March or April of the present year. Furthermore, the motion does not go to jurisdictional questions alone, but is an attempt to reach the whole case on its merits and to secure a decision without a full consideration thereof. In view of these facts and the further fact that the question raised in the motion to dismiss cannot properly be determined without a full consideration of the case and without going into those features of it which necessarily deal with the merits, it is respectfully submitted that this motion should be considered with the whole case on final hearing.

STATEMENT.

The policy, or contract of insurance, was entered into in 1894, between Richard Head, a citizen and resident of the then territory of New Mexico, and the plaintiff in error, New York Life Insurance Company, a citizen and resident of the State of New York, licensed to do business in the State of Missouri. The assured was in the live stock business and frequently came to Kansas City, Missouri, in connection with his business. In this way it happened that the application for insurance was made in Missouri. The record will show that practically all of the premiums on the policy were paid to and all transactions in regard to the policy were had with either the Insurance Company's office in New Mexico or in Colorado from the year 1895 until the policy was settled under the policy loan agreement. Where the first premium was paid is a disputed question of fact, but at that time, Mr. Head, the assured, being about to leave Kansas City, requested the soliciting agent to deliver the policy, when received, to his (Head's) friend, Mr. Deatherage, as a matter of convenience merely. Mr. Deatherage resided and had an office in Missouri. When Mr. Head came to Kansas City some time afterward, Mr. Deatherage delivered the policy to him at his office.

The application for this policy, which is made part of the contract of insurance, provides, among other things,

> "That the contract containing such policy and this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the State of New York."

The policy also contains certain non-forfeiture provisions which may be briefly stated to conform to the non-forfeiture provisions of the statutes of the State of New York relating to such matters.

In his application, which is made part of the policy, Mr. Head recited that he was a resident of the State of New Mexico, County of Mora, town of Watrous and that his place of business was there. The policy issued in pursuance of this application recites the same fact as to residence. The application likewise recites

that the proceeds of the policy, in event of death, are to be paid to Richard G. Head, Jr., whose residence, also, was Watrous, New Mexico. The proceeds of the policy, by its terms, are payable at the office of the New York Life Insurance Company in the State of New York.

In short, the contracting parties were both non-residents of the State of Missouri; the beneficiary was likewise a non-resident of said state; the place of performance, or payment, was outside of Missouri. The transaction happened in Missouri merely by chance, or as a matter of convenience to the assured.

The policy had been running but a few years when the assured and beneficiary borrowed money from the Insurance Company under the company's usual loan agreement. This loan was renewed and increased from time to time. On each occasion a new loan agreement was signed. The last loan agreement bears date in April, 1904. These loan agreements were all signed and delivered to the company's agent within the then territory of New Mexico *and it will not be claimed by defendant in error that they were either signed or delivered within the territorial limits of the State of Missouri or that there was in them any provision or agreement that they should be governed or controlled by the laws of said state.* The loan agreement of 1904 provided:

> "Sec. 2. If any premiums on said policy, or any interest on said loan is not paid on the date when due, settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid up insurance of reduced amount in accordance with Section 88, Chapter 690 of the laws of 1892 of the State of New York."

And, also.

> "Sec. 4. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, or before settlement shall have been made in accordance with Section 2 of this agreement, said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy."

Neither the loan interest, nor the premium due in 1905, was paid and in May, 1905, the insurance company, in accordance with the terms of the loan agreement and on account of default in the payment of the premium and loan interest, due April 3, 1905, settled the policy in strict accordance with the terms of the loan agreement and in accordance with the terms of the face of the policy itself, and in accordance with the laws of the State of New York applicable thereto. The policy so endorsed for paid up insurance ($89.00) was sent to Mr. Head and by him delivered to his daughter, who retained it until his death about a year later.

This suit was begun in September, 1906. The petition was in two counts. In the first count, plaintiff sought to recover under Sections 7897 and 7898 of the Revised Statutes of Missouri, 1899, and in the second count recovery was sought under Section 7899 of said statutes. Without setting forth the substance of the Missouri non-forfeiture statutes relied upon by defendants in error, suffice it to say that it is conceded that unless these statutes are to be read into the contract of insurance and unless the non-forfeiture provisions of the policy of insurance, and the terms of the policy loan agreement are entirely disregarded, there can be no recovery in this action.

It will be found from an inspection of the record, when printed, that at the proper time and in proper form, plaintiff in error throughout the trial in the *nisi prius* court and in the Supreme Court of Missouri, duly raised and saved all of the constitutional questions which are relied upon to give this court jurisdiction. Some of these are found in the statement of defendant in error and others will appear properly in the record itself. It is not and will not be claimed that there was any failure on the part of plaintiff in error to timely and properly preserve in the record and by assignments of error in this court any of these constitutional questions.

Many Missouri cases are referred to in the statement of defendant in error, but prior to the decision in this case, it had never been held in the State of Missouri that the insurance laws of the state were applicable to the insurance contracts of non-residents where neither the assured nor the beneficiary was a resident of such state and where the contract was to be performed entirely outside

of the state. In the Missouri cases referred to by defendant in error, the assured was in each instance a resident of the State of Missouri.

Subsequent portions of these suggestions will show clearly that the plaintiff in error does not concede that the brief of defendant in error correctly sets forth its contentions or the Federal questions which it invokes in order to give this court jurisdiction.

Counsel of defendant in error in their statement in support of this motion say: (page 4)

> "It is not denied, but is admitted that the judgments in these cases were in conformity with the laws of Missouri relating to life insurance companies in force at and before the time of the issuance of these policies and at and before the time when this insurance company on its own application was licensed to do business as a foreign insurance company in the State of Missouri at Kansas City therein."

If, by this statement, counsel for defendant in error mean that we admit the Supreme Court of this state has held against us in this case, of course that is conceded; but until this case and its companion case had been decided, it had never been held in Missouri or elsewhere, so far as we are aware, that the non-forfeiture statutes of this state were, under such circumstances as exist here, to be read into the contract of insurance and that all provisions inconsistent therewith were to be eliminated; and that the parties thereafter, though non-residents of the state and contracting outside of its territorial limits, would not be permitted to amend or eliminate the statutory provisions thus read into the original contract.

BRIEF AND ARGUMENT.

I.

The Missouri non-forfeiture statutes applicable to life insurance contracts, just as its suicide statutes, are in effect merely "legislative declarations of the public policy of this state."

Keller v. *Insurance Company*, 58 Mo. App. 557, l. c. 560;
Whitfield v. *Life Insurance Company*, 205 U. S. 489.

II.

We do not deny or question the right of the state to impress upon the contracts of its own citizens such terms as are consistent with its legislative declarations of its public policy, or to exact of corporations, as a condition precedent to the right to do business within a state, that in such business as shall be done with the citizens of the state, the policy of the state shall be observed. It follows that if the contract of insurance in question had been entered into by a citizen of Missouri, the non-forfeiture statutes of Missouri would be read into the contract even though the contract itself, stated that it was to be governed by the laws of the State of New York. This was the situation and the rule announced in all the Missouri cases referred to by defendant in error.

But such is not the situation presented in this case.

III.

Here, the Supreme Court of Missouri has read into the contract of non-residents the forfeiture laws of said state; (although, as pointed out heretofore, the beneficiary in the policy was likewise a non-resident; the contract of insurance was not to be performed within the state; affected in no way any resident or property within the state); against the expressed desire and contract of the non-resident parties, who stipulated in the contract that it should be governed by the laws of the State of New York. Plantiff in error claims that this is a violation of the sections of the Constitution referred to in it assignments of error; that it is

an unwarranted and unconstitutional interference with the liberty of contract and the property right of contracting as well; that it is usurpation under authority of the state, in that an attempt is made to impose upon non-residents matters of the state's public policy to which obedience can be lawfully required only when one of the parties, at least, is a citizen of that state.

Pennoyer v. *Neff*, 95 U. S. 714, l. c. 722, where it is said:

> "As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, etc. * * * Whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation."

IV.

That the right of plaintiff in error to make contracts (the making of contracts being its only business) is protected by the Fourteenth Amendment admits of no controversy..

Allgeyer v. *Louisiana*, 165 U. S., 578, at 591;
Lochner v. *New York*, 198 U. S., 45, at 52, 53;
Door Co. v. *Fuelle*, 215 Mo., 421, at 458.

Here the contracting parties were two non-residents of Missouri, making a contract to be performed outside of the state and stipulating that it was to be governed by the laws of another state. This may properly be done and such a contract cannot be lawfully destroyed or impaired.

V.

The valid contract of these non-resident parties could not be lawfully impaired either by legislation or judicial decision.

Olcott v. *Supervisors*, 16 Wall. 678, where it is said:

> No subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.

Union Bank v. *Board of Commissioners,* 90 Fed. 7, where the court say, (page 9):

> The national Constitution forbids the states to pass laws impairing the obligation of contract and that end can be accomplished *no more by judicial decision than by legislation.*

VI.

When the printed record is before this court, it will be found that a loan agreement was entered into by these same parties within the territorial limits of the then Territory of New Mexico; that the parties to this loan agreement were all non-residents of the State of Missouri and comprised all of the parties to the policy, or contract of insurance, including the defendant in error; that the *said loan agreement was prepared, executed and delivered outside of the State of Missouri and that it directly and in precise terms recognized and reaffirmed the non-forfeiture provisions contained in the original policy as delivered.* The decision of the Supreme Court of Missouri not only impairs the original contract by impressing upon it the provisions of the Missouri statutes, but it also, by impressing the same provisions upon this later contract nullifies and destroys it in violation of the constitutional guaranties. It deprives the plaintiff in error of its property without due process of law.

Emphasis is added to this contention when it is observed that in 1903 the Legislature of Missouri had actually amended the law in force at the time the original contract was written so that when the loan agreement was made in 1904, its provisions were not inimical to the written terms of the original policy nor to the provisions of the loan agreement. It follows, that not only does this decision of the Supreme Court of Missouri impair the contract contained in the loan agreement, made outside the territorial limits of Missouri between non-residents, but it does so despite the fact that the agreement, itself, was not at the time when it was made, contrary to the public policy of the State of Missouri.

VII.

We contend that counsel for defendant in error appear repeatedly to misapprehend the real questions at issue in the case, on which reliance is placed to give this court jurisdiction and notably so in Point 2 of their brief and argument. Defendant in error attempts to so put the question as to make it appear that the Insurance Company is claiming that these non-residents were not entitled to the benefit of the Missouri laws relating to life insurance *even if they had desired their protection and benefit when entering into the contract.* This is not a fair statement of the Insurance Company's position in this regard. We can admit that if these non-residents had entered into a contract with the Insurance Company which provided that the contract should be construed according to the laws of the State of Missouri, or if the contract, being made in Missouri, had omitted a stipulation to the effect that it should be governed by any other law, then they would be entitled to whatever advantage came to them by the non-forfeiture laws of the State of Missouri. But such a case is not before the court. Here the non-resident assured contracted that the policy should be governed by the laws of the State of New York and the non-resident beneficiary (both at the time the contract was made and at the time the suit was brought) is now demanding that the laws of Missouri be read into the original contract contrary to its expressed provisions, and into the subsequent loan agreement above referred to. The Courts of Missouri have complied with this demand of the defendant in error but the Insurance Company, by reason of the facts stated, denies the right of the courts of Missouri to do this and claims that to do so under the circumstances is a plain violation of the constitutional guaranties. This action of the courts exercised under State authority is nothing else than the taking of property and property rights without due process of law; the unlawful impairment of a valid contract; the deprivation of the liberty to contract and the denial of the right to equal protection of the law. Hence the authorities cited by defendant in error to the effect that a non-resident may have the protection of certain state laws under appropriate circumstances, or where he has expressly contracted therefor or with reference thereto, are beside the case and will be of no assistance to the court in the determination of the real questions.

VIII.

It will be seen, from what we have stated, that the decision of the Supreme Court of the State of Missouri in this case impairs the contract of insurance in *two* ways. Not only does it strike down certain provisions both of the original policy and the loan agreement, but it reads into the contract terms and provisions *without the consent and against the will of all the parties thereto.*

In other words, the court, exercising authority under the state, undertakes to make a new contract for the parties against the desire and will of both, as indicated by the original agreement.

Conceding the general rule that a contract can only be impaired within the meaning of that clause of the Constitution so as to give this court jurisdiction on a writ of error to the State Court, by some statute of the state subsequent to the contract, yet here the impairment is not, simply in the nature of the destruction of the agreement between the parties, but it takes the further form of creating a contract between the parties without their consent and against their will. The courts of Missouri by the decision in this case undertake to extend the statute law so as to reach and operate upon citizens of other states, casually within its confines, and not only deny them the right to make contracts of insurance to be performed elsewhere, except upon the terms of the Missouri statutes, but as to certain provisions actually write the contracts for these non-residents. The impairment of the contract of which we complain is wholly different from that sort of impairment which is involved in the cases cited by the defendant in error. Such action by the courts of Missouri is not properly a question of statutory construction at all. *It is interference by judicial decision with the liberty of contract. It is the taking of property, as in this instance, without due process of law.* And when, as here, the judicial decision of the court, acting under authority of the state, goes still further and denies to these non-resident parties the right to amend or alter or re-affirm the original contract of insurance by an agreement executed and delivered outside of the state and impresses such extra-territorial agreement with other terms and conditions to which neither party consented, creating and enforcing

liabilities where there were none by the terms of the contract, the denial of liberty and the taking of property without due process of law under the guise of judicial decision could scarcely be clearer.

Respectfully submitted,

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NUMBER 254.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

VS.

MARY E. HEAD, DEFENDANT IN ERROR.

Statement, Motion to Dismiss the Writ of Error to the Missouri Supreme Court for Want of Jurisdiction, Brief of the Argument in Support Thereof, and Notice and Service Thereof on Plaintiff in Error's Attorneys of the Presentation of the Same to Said Court.

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VS.

MARY E. HEAD, DEFENDANT IN ERROR.

STATEMENT.

This was a suit in the Circuit Court of Jackson County, Missouri, by defendant in error against plaintiff in error, on a policy of life insurance issued by plaintiff in error in April, 1894. The policy was issued on the life of Richard G. Head, for Ten Thousand Dollars. The policy was payable to his infant son, Richard G. Head, Jr., in said case No. 254. Mary E. Head afterwards became the assignee of the policy. In No. 255, said Richard G. Head, Jr., was the plaintiff on a like policy issued at the same time. In each case there was a judgment for the full amount of the policy less a certain loan which had been made thereon, the judgment in each case being for about $7500.00. Appeals from the State Circuit Court were taken by the Insurance Company to the Missouri Supreme Court, where the judgments of the Circuit Court were affirmed. The opinions of the Supreme Court are not only contained in the record now before this Court, but also are fully reported in *Head* v. *New York Life Insurance Co.*, 147 S. W. Rep., 827-832; *Head* v. *New York Life Insurance Co.*, 241 Mo. 403-420.

After these judgments of the Missouri Supreme Court affirming the judgments of the Circuit Court, the Insurance Company sued out writs of error to this Court, and the question on this motion is whether there is any federal question in the cases conferring jurisdiction on this Court.

In the State Circuit Court, each case was tried by the court without a jury. The principal question in the case in both state courts was, whether the policies were Missouri contracts governable by the laws of that state or were governable by the laws of the State of New York.

At the conclusion of all the evidence in each case, the court gave a declaration of law for the plaintiff, declaring that: "The policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of the policy, and not governable by the laws of the State of New York."

Defendant objected to this declaration of law and excepted to the giving of it by the trial court, assigning as the grounds of its exception: "That to apply the Missouri Statute and laws to the insurance contract in this case would violate and be in contravention of the rights of defendant under Article 1 of Section 10 of the Constitution of the United States and the Fourteenth Amendment thereof."

The court also declared, in another declaration of law: "That on the facts shown in evidence in this case, the plaintiff is entitled to recover and that the issues should be found in favor of plaintiff. Defendant objected and excepted to the giving of this declaration, for the same reason stated above.

The trial court gave a further declaration of law, No. 3, to the effect that plaintiff was entitled to a judgment against the Insurance Company for the amount of the policy of $10,000, less the sum of $2270.00, which had been loaned by the Company to defendant in error, and the Insurance Company saved the same exceptions to the giving of that declaration.

The Insurance Company filed a motion for a new trial in each case in the State trial court, and in said motion for a new trial the Insurance Company made an assignment as follows:

> "12. Because the court erred in that by its ruling and holding that said contract of insurance was governed by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed, notwithstanding the fact that none of the parties to said contract were

residents or citizens of the State of Missouri, the court invaded and deprived this defendant of the rights guaranteed it under the Constitution of the United States of America, and especially its rights under Article 1, Section 10 of said Constitution, and Section 1 of Article XIV of the amendments of the Constitution."

This motion having been overruled, the Insurance Company took an appeal in each case to the Missouri Supreme Court. After the judgment of affirmance in both cases had been given in the Missouri Supreme Court, the Insurance Company filed a motion for rehearing in each case and assigned as grounds thereof that: "The decision of the court in this cause is in conflict with the Constitution of the United States and controlling court decisions."

This motion for a rehearing in each case having been overruled, the Insurance Company in each case sued out a writ of error to this court.

In the assignments of errors, the Insurance Company made the following assignment:

"1. Because the Supreme Court of the State of Missouri denied to the plaintiff in error a right, privilege and immunity to which it is entitled and which is guaranteed to it under and by Section 10 of Article 1 of the Constitution of the United States and under and by Section 1 of Article XIV of the amendements thereof in that the Supreme Court of the State of Missouri by its ruling and decision in said cause held that the contract of insurance sued upon and which was the basis of the action, was governed as to the amount due thereunder by the laws of the State of Missouri as said laws existed at the time said contract of insurance was executed and not by the terms of the written contract of insurance, notwithstanding the fact that neither the plaintiff in error, who was defendant in said action, nor any of the other parties to the said contract nor any person beneficially interested therein were residents or citizens of the State of Missouri at the time said contract was entered into nor at any time thereafter and also notwithstanding that the parties to said contract of insurance expressly agreed and wrote into said contract that the said contract should be governed and construed by and under the laws of the State of New York, of which state this plaintiff in error is and was a resident citizen."

Another assignment in the assignment of errors of the Insurance Company is as follows:

"3. Because the Supreme Court of the State of Missouri deprived the plaintiff in error of a right and immunity

to which it was entitled under Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment of said Constitution."

There are other assignments set forth in said assignments of error, couched in different language, but they each and all affirm the proposition that the error complained of under the Constitution of the United States was by the Supreme Court in its opinion. In none of the state courts nor in this court is there any complaint that the Missouri Legislature, after the issuance of the policy in each case, passed any law impairing the obligation of the insurance contracts or denying to the Insurance Company due process of law or depriving the Insurance Company of the equal protection of the laws. All of the specifications of assignment, both in the state court and in this court, are that the Insurance Company was denied its right under the Federal Constitution, by reason of the decision of the Supreme Court, in giving effect to laws that were in force in the State of Missouri at and before the time of the issuance of these policies.

For some years prior to the issuing of these policies, the plaintiff in error had a branch office at Kansas City, Missouri. All of the laws of Missouri which were given effect in these cases were in force when the Insurance Company came into the State of Missouri and obtained its license from the State of Missouri to do business at its branch office. The insurance laws of Missouri at the time that the Insurance Company obtained this license to do business in that state, provided that foreign companies thus licensed "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state and shall have no other or greater powers."

It is not denied but is admitted that the judgments in these cases were in conformity with the laws of Missouri relating to life insurance companies in force at and before the time of the issuance of these policies and at and before the time when this Insurance Company, on its own application, was licensed to do business as a foreign insurance company in the State of Missouri, at Kansas City, therein.

On facts very similar to the facts in the case at bar, the Supreme Court of Missouri, in the case of *Cravens* v. *New York Life Insurance Co.*, 148 Mo. 583, held that the policy sued on in that case was a Missouri and not a New York contract, although the policy provided there that New York should be deemed the place

of the contract and that the contract should be construed according to the laws of New York. In that case, as in the case at bar, the application for the policy was made in Missouri, the first premium was paid in Missouri and the policy was delivered in Missouri; and the Supreme Court held there, as it held in the cases at bar, that those facts made the policy a Missouri and not a New York contract, notwithstanding the stipulation of the parties in the policy.

> "Such a contract being executed here, is subject to the laws of Missouri, anything in the contract to the contrary notwithstanding."

It was further adjudged in that case that:

> "Foreign insurance companies which do business in this state, do so not by right but by grace, and must in doing so conform to its laws. Moreover the State may prescribe conditions upon which it will permit such companies to transact business within its borders or exclude them altogether, and in so doing violate no contractual rights of the company."

It was further adjudged that:

> "A statute with respect to the subject matter in force at the time the contract is entered into within the State, becomes a part of the contract, as much so as if copied into it."

It was also adjudged in that case that,

> "when no statute intervenes prohibiting it, a corporation doing business by permission in another state than that of its incorporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but where the laws of the State in which it does business by license prohibits such corporation from making certain kind of contracts, it can act only in accordance therewith."

And this Insurance Company having been held liable on the policy in that case, it was removed by the Insurance Company to this United States Supreme Court. And this court in its opinion affirmed the said judgment of the Missouri Supreme Court. *New York Life Insurance Co.* v. *Cravens*, 178 U. S., 389. And the said propositions of the Missouri Supreme Court were approved.

The only difference between the said case of Cravens as decided both by the Missouri Supreme Court and by this court, consists in the fact that Cravens was a resident citizen of Missouri while said Richard G. Head and his family, including these two children who are plaintiffs in these actions lived, resided in and were citzens of New Mexico at the time of the taking out of these two policies for $10,000.00 each.

It appears from the statement of facts in the Supreme Court decisions in these cases that Richard G. Head, to whom these policies were issued, often had business at Kansas City, Missouri; that being solicited by an agent of the defendant he gave an application for these two policies to said soliciting agent; that the application was sent to the New York Insurance Company through its branch office in Kansas City; that the two policies in these suits were thereupon transmitted by defendant to its branch office in Kansas City and delivered to Mr. Head in said Kansas City, and that the first premium was paid by Mr. Head in Kansas City. On these facts, the Missouri Supreme Court held that the policies were Missouri contracts. That court had decided to the same effect also in *Horton* v. *New York Insurance Co.*, 151 Mo. 604.

In these cases the court held that since the policy was delivered by the company through its branch office in Missouri, where the application was made and where the first premium was paid, it then on these facts became a binding contract, and that the mere mailing in New York of the policy to its agent in Missouri for delivery to the insured, did not make it a New York contract.

In the cases at bar, the policies each provided for the making of loans by the Insurance Company to the insured, and a loan was made on each of these policies in 1904, ten years after the issuance of the policies. It is claimed by the Insurance Company that these loans made in 1904, which provided the same as the policy that the loan contract should be a New York contract, is a new and binding contract, independent of the policy under which it was made, and that even if the original policy was a Missouri contract, the making of that loan converted the policies into New York contracts. And it was claimed in this connection that, computing the amount due on the policies according to New York laws, there was only the sum of $89.00 due on the policy.

In said case of Cravens against this Company, decided by the Missouri Supreme Court and also by this court, it was held that such loan contracts as were made in the cases at bar could not avoid the provisions of the insurance laws of Missouri respecting the rights of policy-holders under the non-forfeitable statutes of Missouri. At the bottom of p. 604, in the opinion of the Missouri Supreme Court in the Cravens case, it is said:

> "The question then is, could the parties themselves enter into a contract, either directly or indirectly, waiving the provisions of the statutes?

And that question was answered in the negative.

The same decision was made by the Supreme Court in the case of *Smith* v. *Insurance Company,* 173 Mo. 329. It was there decided again that these loan contracts, whatever provisions they might contain could not, directly or indirectly, change the rights of the parties under the policy construed as Missouri contracts when the policies were issued. This decision was in 1903, and this case was decided, as was the other cases heretofore referred to, by the Missouri Supreme Court, before the loan contracts in this case were made in 1904.

The same question was adjudged in like manner by the Missouri Supreme Court in the case of *Burridge* v. *New York Life Insurance Company,* 211 Mo. 158. In this last case the Missouri Supreme Court adjudged that:

> "Where the loan and pledge were contemplated by the policy, they do not constitute a contract distinct and independent from the policy."

It was also adjudged in that case as follows:

> "Neither at the time the policy is drawn and issued, nor by any supplemental subsequent contract in lgeal effect an amendment to the policy, such as a loan contract and pledge, is it permissible to whittle away the non-forfeiture statute requiring the net value of the defaulted policy to be applied to extended insurance."

The court expressly followed in this Burridge case its previous opinion in the case of *Smith* v. *Mutual Benefit Life Insurance Co.* These cases were all decided during the years when Mr. Head was paying the premiums on these two $10,000 policies, and all of the foregoing decisions except the last one, in the Burridge case, were before the making of the loan contract, as we have seen.

The policies provided for twenty annual premiums, and much more than half of the premiums due for that twenty years had been paid prior to the death of Mr. Head.

In its opinion and judgments in these cases the Missouri Supreme Court did not decide any federal question. It held that when the defendant Insurance Company came into Missouri it was bound by its laws and that business transacted by its branch office in Missouri were Missouri contracts, and that the contracts in these cases were Missouri contracts. It held that the policies before delivery at the branch office in Kansas City, Missouri, were as much in the possession of the defendant as the policies would have been if they had been retained in New York. The court also held in its opinion that the fact of the residence of the Head family in New Mexico,

where there was no branch agency, did not make the case any different than if that family had lived in Missouri. The court holds on that point, that the benefits of the Missouri statutes are not only for those who live in Missouri, but are for the benefit also of those who come into Missouri, residing elsewhere, to transact business in that state. It held that the insurance legislation of Missouri was equally for the benefit of those policy-holders who might obtain policies at the Kansas City branch office, who lived in Missouri, and for the benefit also of those living elsewhere who might come to Kansas City to transact business, and in like manner take policies at the same branch office. The court also held that where the original policy contemplates the making of a loan, that that loan does not change the policy contract into a New York contract, but that all such loans as were made in this case are mere subsidiary contracts. The court in its opinion, on this branch of the case, said:

> "It is not an open question in this state that all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change or modify the writing and obligation that existed on the original contract of insurance."

It was also held that the tender and payment to the plaintiff of said $89.00 did not extinguish the right of the plaintiff to recover the full sum of $10,000, as provided in the policy, less the loan thereon, with interest. The court, on this branch of the case said:

> "In other words, no tender nor payment of any sum less than the full amount of any unquestioned indebtedness will bar the party from prosecuting a suit for the entire amount due."

Under Missouri laws, plaintiff was entitled to a recovery of $7,500, and the court held that the Insurance Company could not extinguish that demand by paying $89.00.

The opinions and judgments in these cases are in perfect harmony with the preceding decisions of the Missouri Supreme Court in the cases cited above, which were promulgated during the time that Mr. Head was paying his premiums, and all of them, with one exception, before the making of the loan contract of 1904.

MOTION TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

And now comes the said defendant in error and moves the court to dismiss the writ of error herein for the reason that there is no federal question in this case and because this court is without jurisdiction in this case.

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BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
W. P. BORLAND,
JAMES A. REED,
Attorneys for Defendant in Error.

BRIEF OF THE ARGUMENT.

I.

Where the federal question upon which the jurisdiction of the United States Supreme Court on the writ of error to the State Court is based grows out of an alleged impairment of the obligation of the contract by the decision of the State Court and not by a subsequent statute of the state legislature, such alleged impairment is not within the meaning of the Constitution, does not confer jurisdiction on the United States Supreme Court, and hence the writ of error in these cases should be dismissed.

R. R. Co. v. *Rock*, 4 Wall., 177.
Knox v. *Bank*, 12 Wall., 379.
People v. *R. R. Co.*, 12 Wall. 455.
Sevier v. *Haskell*, 14 Wall. 12.
Water Co. v. *Easton*, 121 U. S. 388.
Waterworks Co. v. *Refining Co.*, 125 U. S. 18.
Hopkins v. *McClure*, 133 U. S. 380-386.
Land Co. v. *Laidley*, 159 U. S. 103.
Bacon v. *Texas*, 163 U. S. 207.
Building Ass'n v. *Braham*, 193 U. S. 647.
Crosslake Club v. *La.*, 224 U. S. 632.
Oshkosh Water Co. v. *Oshkosh*, 187 U. S. 437, 438, 446.
R. R. Co. v. *Adams*, 180 U. S. 41.
Gaslight Co. v. *St. Paul*, 181 U. S. 142.
Waterworks Co. v. *La.*, 185 U. S. 336.
Turner v. *Board*, 173 U. S. 461.

The question whether these policies were Missouri or New York contracts was and is not a federal question, but is a question of general jurisprudence. But even if it had been a federal question, still the decision of that question does not in any view of the case constitute an impairment of the contracts sued on. That impairment can only be accomplished by a statute passed after the issuance of the policies and depriving the insurance company of some rights under those policies. All of the legislation of Missouri applicable to the cases of these policies was enacted long before the issuance of these policies, and were repeatedly construed, as we have seen, by the uniform decisions of the Missouri Supreme Court and by one decision by this court.

II.

Nor does the fact that Mr. Head with his family lived in New Mexico when these policies were issued make those policies any less Missouri contracts. The question of conflict of laws in all such cases, that is, whether a given contract is a New York contract or an Illinois contract or a Missouri contract, does not depend upon the citizenship or residence of the parties. It depends upon other and entirely different considerations. If it is desirable to consult the cases, the following may be referred to to show that the residence and citizenship of the parties does not enter into the situs of the contracts as to where they are made.

Milliken v. *Pratt*, 125 Mass. 374.
Golden v. *Ebert*, 52 Mo. 260.
Richardson v. *DeGiverville et al.*, 107 Mo. 422.
Rube v. *Buck*, 124 Mo. 178.
Reed v. *Western Union Tele. Co.*, 135 Mo. 661.
Horton v. *New York Life Ins. Co.*, 151 Mo. 604.
Elliott v. *Des Moines Life Association*, 163 Mo. 132.
Thompson v. *Traders Ins. Co.*, 169 Mo. 12.
Park v. *Conn. Fire Ins. Co.*, 26 Mo. App. 511.
Hauck Clothing Co. v. *Sharpe*, 83 Mo. App. 385.
Pietri v. *Sequenot Adm.*, 96 Mo. 258.

See as precisely in point:

Napier v. *Ins. Co.*, 100 N. Y. Supp. 1072.

The close of Section 1 of the Fourteenth Article of the Amendments to the Constitution of the United States, provides as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. Head was certainly within the jurisdiction of the State of Missouri when he applied for these insurances, paid the first premiums and received the policies. He was within the jurisdiction of the State of Missouri and therefore entitled to the equal protection of its laws. This proposition has more than once been adjudged by this court. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 569. In that case it was adjudged that the grounds of protection contained in the Fourteenth Amendment of the Constitution extended to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color or nationality.

So, in the case of *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, l. c. 209, this court said:

> "Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed."

The rights of Mr. Head in this case are precisely the same as if he had been a resident of Missouri, the same as Mr. Cravens in his case.

See also:

Duncan v. *Missouri*, 152 U. S. 377.
Frazier v. *McConway*, 82 Fed. 257.

In that case, the Circuit Court of the United States for the District of Pennsylvania in its opinion, said:

> "The equal protection of the laws declared by the Fourteenth Amendment of the Constitution, and enforced by the laws of the United States, is not confined to citizens, but secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances."

So in the case of *Templar* v. *Barber's Board of Examiners*, 131 Mich. 254, the Supreme Court of Michigan adjudged the following proposition:

> "The provisions of Sec. 5 of the Barber's License Law (Act No. 212, Pub. Acts, 1899) that no alien shall be entitled to a certificate is repugnant to the Fourteenth Amendment of the Federal Constitution, as denying the equal protection of the laws."

So, in *Steed* v. *Harvey*, 18 Utah, 367, the Supreme Court of the State of Utah adjudged the following:

> "The provision of the Fourteenth Amendment to the Constitution declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, secures to every person within the jurisdiction of the state, though not a citizen or even a resident, the protection of its laws equally with its own citizens and entitles him to the same remedies."

The same proposition was adjudged in the case of *Pearson and Wife* v. *City of Portland*, 69 Me. 278. That was an action to recover damages by the plaintiff, Mrs. Pearson, for injuries from a defective way in said City of Portland. The plaintiff, Mrs. Pearson and husband were residents of Cuba and had no residence in the State of Maine. ~~They only had a residence in the State of Maine for~~ They were only there for temporary business purposes. In that State there was a statute which provided, as follows:

> "No person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country."

The Supreme Court of Maine held that statute to be unconstitutional. In its opinion the court said that the above statute was in conflict with the Fourteenth Amendment of the United States Constitution; that by the general statutes in force before the passage of that act, every person sustaining an injury, in person or property, through any defect or want of repair, in any highway, could recover for the same, in an action on the case, against the town, city or county. And in the opinion the court said:

> "This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their highways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects every one alike. The Act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril, and without that protection which the law affords to all others. * * * The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the state it must remain in force for the protection of all similarly situated. The plaintiff was within the jurisdiction of the state at the time of her injury."

So in the cases at bar, we submit that Mr. Head, being within the jurisdiction of the State of Missouri when and where the contract of these policies was made, the insurance laws which governed in these cases were as much for his protection as if he had been living in the State of Missouri. However, this question of the right of Mr. Head under the Fourteenth Amendment to receive the same benefit and protection under the laws of Missouri as if he had lived in the State, was not passed upon by the Missouri Supreme Court in these cases.

The court in effect held that it never had been the policy of the law making power in Missouri or of its courts to discriminate against residents of other states or countries, and had never fa-

vored a policy which held that non-residents were not entitled to the same protection of our laws as residents of Missouri, and it held that the insurance laws on which these judgments were based did not manifest any intention on the part of the legislature framing those laws, to discriminate against citizens of other states. The Missouri Supreme Court, in the concluding clause of the paragraph of its opinion covering this point, used this language:

> "We therefore overrule the contention that the legislature had an express purpose to exclude strangers within our gates from the protection of our laws."

But even if the court had expressly decided that Mr. Head in receiving these policies was entitled to the same rights as if he were a citizen of Missouri, by virtue of said paragraph of the Fourteenth Amendment of the Constitution of the United States and had expressly based that part of its decision and judgment on that ground, still the Insurance Company would not have a right to have that question reviewed on this writ of error, for the reason that it is only in cases where the federal right claimed is denied that jurisdiction of the Supreme Court of the United States on a writ of error to a state court exists. On this branch of the case, the Insurance Company does not claim under the Fourteenth Amendment. As we have seen, the Missouri Supreme Court did not pass on this federal question. It construed the Missouri legislation to apply to non-residents as well as to residents. The State Supreme Court held the legislation of the State to apply to all persons within its jurisdiction, whether they were residents or non-residents. If the State Supreme Court had decided against the children of Mr. Head on the ground that they were not within the protection of the Missouri laws because their father was a resident and citizen of another state or territory, possibly they might have the right to invoke the jurisdiction of this court on the ground of the denial of their right to the same treatment as citizens of Missouri. But we have no such case. The court did not pass upon the question of the status of the Heads by virtue of the Fourteenth Amendment, one way or the other, but held that they were within the scope and purpose of the Missouri statutes, the same as residents and citizens of that State.

III.

It is not denied that both the Circuit Court of Jackson County, Missouri, at Kansas City, and the Missouri Supreme Court in these cases had jurisdiction to decide the questions decided there-

in, and any errors or irregularities which might have been committed by either of those courts does not create an absence of due process of law, and the writs of error in these cases cannot be maintained on the due process of law clause of the Fourteenth Amendment.

Kentwood v. *La.*, 92 U. S., 480-483.
Davidson v. *New Orleans*, 96 U. S., 97-105.
Head v. *Mfg. Co.*, 113 U. S., 9-26.
R. R. Tax Cases, 115 U. S., 321.
Marrow v. *Brinkley*, 129 U. S., 178.
Morley v. *R. R. Co.*, 146 U. S., 162.
Traction Co. v. *R. R. Co.*, 151 U. S., 137.
Marchant v. *R. R. Co.*, 153 U. S., 380.
Bergman v. *Barker*, 157 U. S., 655.
Land Co. v. *Laidley*, 159 U. S., 103.
Castillo v. *McConnico*, 168 U. S., 654.
Lynde v. *Lynde*, 181 U. S., 183-186.
R. R. Co. v. *Schmidt*, 177 U. S., 230-236.
Arrowsmith v. *Harmoning*, 118 U. S., 194.
G. & E. O. v. *Gaidley*, 159 U. S., 194.
Fayerweather v. *Rich*, 91 Fed. Rep. 721; 34 C. C. A., 61.

IV.

As to the point of "equal protection of the laws," it is the settled law of the United States Supreme Court that laws may relate solely to a subject, such as laws affecting railway companies.

Mo. Pac. Ry. Co. v. *Mackey*, 127 U. S., 205-209.
R. R. Co. v. *Matthews*, 174 U. S., 96-105.

And also laws which affect insurance companies.

Ins. Co. v. *Daggs*, 172 U. S. 557-562.

V.

We have thus considered all the objections made by counsel growing out of the impairment obligation and the contract clause and the due process of law and equal protection of laws clauses of the Federal Constitution. No other federal question is presented, and of course no other federal question not raised in the state courts can for the first time be raised here.

Chapin v. *Fye*, 179 U. S. 127.
Bridge Co. v. *Ill.*, 175 U. S. 633.
Ry. Co. v. *Hackett*, 228 U. S. 559-560.

To Messrs. Gardiner Lathrop, Thomas R. Morrow, John M. Fox, Samuel W. Moore, O. W. Pratt and Cyrus Crane, Attorneys of the Plaintiff in Error, New York Life Insurance Company:

Please take notice that the foregoing motion to dismiss the writ of error in said cause for want of jurisdiction, together with the foregoing statement of facts and brief of the argument in support of said motion, together with this notice, will be presented to said United States Supreme Court, in open session, on Monday, the 19th day of January, 1914, and said cause will be submitted to said court on said motion, statement and brief, at that time, at the opening of said court or as soon thereafter as counsel can be heard.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
W. P. BORLAND,
JAMES A. REED,
Attorneys for Defendant in Error.

Received a copy of the foregoing Statement, Motion to Dismiss Said Writ of Error and Brief of the Argument in Support Thereof, together with a copy of the foregoing Notice, this 24th day of December, 1913.

LATHROP, MORROW, FOX & MOORE,
O. W. PRATT,
CYRUS CRANE,
Attorneys for Plaintiff in Error.

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NUMBER 254.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

VS.

MARY E. HEAD, DEFENDANT IN ERROR.

STATEMENT OF THE CASE, BRIEF OF THE ARGUMENT AND ARGUMENT FOR DEFENDANT IN ERROR.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
GOODWIN CREASON,
Attorneys of Defendant in Error.

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NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

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MARY E. HEAD, DEFENDANT IN ERROR.

STATEMENT.

We first call attention to our motion to dismiss the writs of error herein with statements and briefs which are also submitted.

The two policies of life insurance in these two cases No. 254 and 255 were issued by defendant, New York Life Insurance Company, in 1894. Richard G. Head was the insured and his infant son, Richard G. Head, Jr. was the beneficiary in both policies. The policy in No. 254 was afterwards assigned to plaintiff therein Mary E. Head, a daughter of said Richard G. Head. The two suits were brought in the Circuit Court of Jackson County at Kansas City, Missouri, where judgments for plaintiffs were given against said company in both cases for the amounts of the policies less loans which had been made thereon. Afterwards on appeals to the Missouri Supreme Court by the insurance Company both judgments were there affirmed whereupon both cases were brought to this court by writs of error sued out by said company. At the time of the issue of these policies there were in force in Missouri the following insurance statutes being Sections 5856-5857 and 5858 of Vol. 2 of the Mo. Rev. Stat. of 1889, pp. 1385-1386, viz.:

Sec. 5856. POLICIES NON-FORFEITABLE, WHEN. No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual payments, be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the American experience table of mortality, with four and ½ per cent interest per annum, and after deducting from three-fourths of such net value, *any notes or other indebtedness to the company given on account of past premium payments on said policies*, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive (2 R. S. 1889, Sec. 5856 amended-r p. 1385).

Sec. 5857. A PAID-UP POLICY MAY BE DEMANDED, WHEN. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of a policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and ½ per cent per annum, *without deduction of indebtedness on account of said policy*, will purchase, applied as a single premium upon the table rates of the company, and in the case of a limited

payment life policy, or of a continued payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid: *Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and provided further,* that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company (2 R. S. 1889, Sec. 5857, amended-s p. 1386).

Sec. 5858. RULE OF PAYMENT ON COMMUTED POLICY. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 5856, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, *the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: Provided, however,* that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured, *and provided also,* that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid (2 R. S. 1889, Sec. 5858-t p. 1386).

These statutes were originally enacted in 1879, Vol 2, Missouri Rev. Stat. 1879, pages 1170-1171, Sections 5983, 5984 and 5985, and the same sections were continued in force in the revised statutes of 1899, Vol. 2, Mo. Rev. Stat. 1899. p. 1842, Sections 7897-7898 and 7899. The company had a branch office at Kansas City, Mo. and said policies were applied for, and issued by said company to and the first premiums paid by Mr. Head all to and by said company at its said Kansas City branch office. Said insurance laws were in force at the time of said transactions and during the years following during which Mr. Head paid the premiums on said policies and they were in force long prior to the

time when said company came into Missouri and obtained a license from that state to do business therein, according to the laws of that state.

At the time defendant obtained its license to do business in Missouri it became subject to said sections of its insurance laws by virtue of a Missouri statute which provided that foreign companies thus licensed "shall be subject to all the liabilities re-" "strictions and duties which are or may be inposed upon corpo-" "rations of like character organized under the laws of this state" "and shall have no other or greater powers."

The principal question in these cases is whether these policies were, when issued and delivered, Missouri contracts governable by the laws of that state or by the laws of New York. On facts similar to those of these cases the Missouri Supreme Court in the case of *Cravens* v. *New York Life Insurance Company*, 148 Mo. 583, held that the policy therein was a Missouri and not a New York contract although the policy in that case provided, the same as in the cases at bar, that the policy should be governed by the laws of New York. The judgment of the Missouri Supreme Court in that case was affirmed by this court. *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389. See also to the same effect *Horton* v. *Ins. Co.*, 151 Mo. 604, and *Smith* v. *Ins. Co.*, 173 Mo. 329. These cases of Cravens, Horton and Smith were decided by the Missouri Supreme and this court, while Mr. Head was paying the premiums on the policies in these two cases. See also to the same effect *Burridge* v. *New York Life Ins. Co.*, 211 Mo. 158. On the basis of the maxim of *stare decisis* those decisions were followed by the Missouri Supreme Court in its opinions in these cases. See *Head* v. *New York Life Ins. Co.*, 147 S. W. Rep. 827-832; *Head* v. *New York Life Ins. Co.*, 241 Mo. 403-420. See same opinion in the record herein (No. 254, pages 141-151), No. 255, pages 106, 109).

These two cases, although based on two separate policies of life insurance held by two plaintiffs, are companion cases and were tried together in the trial court. The first case here is No. 254 and the second case is No. 255. In the first case, No. 254, Mary E. Head is defendant in error and plaintiff, and in the second case, No. 255, Richard G. Head, Jr., by his next friend, is defendant in error and plaintiff. For convenience we will, in this statement, brief and argument, speak of the first case as the Mary E. Head case, and the second case as the Richard G. Head, Jr., case. The two cases were tried by the trial court without a jury.

The two policies sued on in the two cases were issued by defendant for $10,000.00 each on one single application for the two insurances, made by Richard G. Head, whose life was insured for the above amount in each policy, payable to his son, Richard G. Head, Jr. The application for the two policies was dated March 24, 1894. That application appears at page 25 in the Mary E. Head record and at page 27 in the Richard G. Head, Jr. record. That application shows that the applicant for the insurance and the insured in the policies, Richard G. Head, was born in Missouri, and that at his nearest birthday at the time of his application he was forty-seven years old; that he was married; that he had three other insurance policies in the defendant company, for $10,000.00 each, amounting in all to $30,000.00. The application was for twenty-year policies, that is, policies that would be paid for by twenty annual premiums.

The defendant had a branch office at Kansas City, Missouri, and that branch office was in the company's building in Kansas City, Missouri, known as the New York Life Building. The defendant, although a corporation of New York, had its branch office at Kansas City, Mo., pursuant to the laws of Missouri respecting the doing of business in Missouri by foreign corporations, and was licensed to do business in Missouri prior to the making of said application and the issue of the policies sued on herein. The certificate of the Superintendent of Insurance of Missouri, which certifies and shows that the defendant was duly licensed to transact business in the State of Missouri during the year 1894 and has been continuously so licensed from that year, may be found at page 45 of the Mary E. Head record and at page 31 of the Richard G. Head, Jr. record. It thus appears that by that license defendant was granted permission to do business in the State of Missouri. The defendant thereby became subject to and thereby agreed to be bound by all of the insurance laws of the State of Missouri applicable to life insurance companies, and by reason of that license and the laws of Missouri, defendant occupied no other or different position than if it had been incorporated under the laws of Missouri. The question, therefore, whether this application for insurance and these policies based thereon were and are Missouri contracts, is the same as if the defendant company had been chartered by the laws of Missouri. If the defendant had been chartered or created a corporation under the laws of Missouri, with its home office in

St. Louis, and a branch office at Kansas City, its position respecting these contracts and the question whether these contracts are Missouri contracts would be the same as in the cases at bar. The defendant, in obtaining its license to do business in the State of Missouri and in the establishing of its branch office at Kansas City, did so with a view of not only doing business with the citizens and residents of Missouri, but also with reference to obtaining policies from people who reside in states and territories in the southwest, having business relations with and at Kansas City.

It appears that defendant maintains throughout the United States branch offices at different points. This appears from the testimony of Edward A. Anderson, the defendant's comptroller (Mary E. Head Record, pp. 44, 75; Richard G. Head, Jr., Record, pp. 32-33). These branch offices were each under the charge of an agency director and a cashier, the agency director having principal charge. Under the superintendence of such agency director and cashier, were insurance solicitors who received applications and afterwards delivered the policies to the applicants and collected the premiums. These solicitors are agents of the company. The establishment by defendant of its branch office at Kansas City, Mo., was, as already stated, pursuant to the laws of the State of Missouri and the license of the State of Missouri authorizing defendant to do business in Missouri. But the purpose of its establishment of its branch office at Kansas City, Mo., was not only to do business with citizens and residents of Missouri, but it transacted business at its branch office at Kansas City, Mo., with and issued policies to persons who resided in New Mexico, Texas, Arkansas, and other parts of the southwest.

There is nothing in these records to show that the defendant at its branch office in Kansas City, Mo., did business with the applicants for insurance at that branch and the policy holders to whom policies were there issued on those applications any differently where the applicants chanced to reside in Kansas or in other states or territories of the Southwest, from its methods of doing business with the applicants for insurance at said branch who chanced to reside within the limits of the State of Missouri. Its methods of transacting the business, and the contract rights of the policy holders were the same whether the applications made at said branch and the policies delivered at said branch were by and to citizens and residents of Kansas and other states and territories of the southwest, or whether they were citizens and residents of Missouri.

Although said applicant and insured, Richard G. Head, lived in the Territory of New Mexico, it appears that the defendant at that time had no branch office in New Mexico where it could do business with Mr. Head, or where it could solicit his insurance or deliver to him any policies at the time the policies sued on were issued. Nor is there anything in the record showing that the defendant ever complied as a foreign corporation with the laws of Kansas, or any of the other southwestern states or territories with whose citizens defendant habitually transacted business and received applications and issued policies of insurance through and at its Kansas City branch office.

Its license only authorized it to do business in Missouri, and this fact made defendant, of its own volition and choice, subject to Missouri laws.

Comptroller Anderson testified that the New Mexico branch office was first opened in January, 1895 (Mary E. Head, Record p. 80), and the record shows that the only southwestern branch office maintained by the defendant in 1894 when these contracts of insurance were made was its said branch office at Kansas City, Mo. It thus appears that said Richard G. Head could only obtain these insurances from the defendant in the precise method in which this insurance was solicited and issued, at defendant's branch office at Kansas City, Missouri, and that at that time defendant was licensed to do business only in Missouri, and according to its laws. Said Richard G. Head, although a resident of New Mexico, did much business at Kansas City, Mo. He was in the live stock business, and his live stock business brought him to Kansas City, Mo., often. He also had considerable legal business which he transacted with Mr. Deatherage, as his attorney, at the law office of Mr. Deatherage in the New York Life Building, owned by the defendant, in Kansas City, Missouri, this being the same building in which defendant had its branch office, and while in said law office of Mr. Deatherage, said Richard G. Head was solicited by Mr. B. Magill, a soliciting agent of the defendant, to take these insurances. The testimony of Mr. Magill, who solicited and obtained from said Richard G. Head the insurance in these two cases, is contained in the record in these cases (Mary E. Head, Record pp. 16, 30, and Richard G. Head, Jr., Record p. 18).

The testimony of Mr. Magill shows that said Richard G. Head was a member of the Drumm-Flato Commission Company, doing business at the Stock Yards in Kansas City, Mo.; that said Richard G. Head was a stockholder in that company. Mr. Ma-

gill's testimony further shows that he solicited said Richard G. Head to take these insurances and received from said Head said application, in the law office of Mr. Deatherage, in the New York Life Building, in Kansas City, Mo., and that he turned over said application either to Mr. White or Mr. Lyon, who were the directing agent and cashier of the defendant company at its said branch office. Mr. Magill further testifies that he, at time of taking said application, took from said Richard G. Head his note for the premium on said two policies, amounting to $850.00, payable in thirty days. The date of the application, which shows when the application was taken and when said 30 day note was given was March 24, 1894. The policies which were dated and issued on April 3, 1894, were sent by defendant to its said Kansas City branch office from New York.

The testimony of Mr. Magill further shows that upon the return of the two policies to the Kansas City branch office from the defendant at New York, the premiums were paid by said Richard G. Head and the policies delivered to him through his said attorney, Mr. Deatherage, and that those policies were delivered to Mr. Deatherage for Mr. Head in his said law office in the New York Life Building in Kansas City, Mo., and said premiums were paid by said Richard G. Head by giving a draft on said Drumm-Flato Commission Company, in Kansas City, Missouri, of which said Richard G. Head was a member and a stockholder.

It thus appears that the business and the transactions of the issue of these policies and the making of the contracts evidenced thereby, all took place in Kansas City, Jackson County, Missouri.

One of the contentions of defendant is that these insurances took effect from the time of the mailing of the policies by it from New York to its branch office at Kansas City, notwithstanding the policies were not to be and were not delivered or mailed to said Richard G. Head and notwithstanding they were not delivered until after they were received at and by the branch office in Kansas City, Missouri, and notwithstanding the fact that the premiums were not to be and were not paid by said Richard G. Head until the policies were delivered to him by defendant's agents at its branch office at Kansas City, Mo., after their receipt thereof from the company in New York.

Upon this point, we call attention to the following provisions of the policy, which are in the record in each case. At page 20

of the record in the Mary E. Head case appears the following provision in each policy:

> "This contract is in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of four hundred and twenty-five dollars and ..... cents, *to be paid in advance*, and of the payment of a like sum on the third day of April in every year thereafter during the continuance of this policy."

In each policy is also the following provision (Record p. 20):

> "If the insured is living on the third day of April in the year nineteen hundred and fourteen, on which date the accumulation period of this policy ends and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:"

There appears also in each said policy the following provisions (Mary E. Head, Record pp. 21, 22):

> "Powers not delegated.
>
> "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.
>
> Payment of Premiums.
>
> "All premiums are due and payable at the Home Office of the company unless otherwise agreed in writing but may be paid to agents producing receipts signed by president, vice-president, second vice-president, actuary or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall become the property of the company.
>
> Grace.
>
> "After this policy shall have been in force three months, a grace of one month shall be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium

remains due and unpaid. During the said month of grace, the unpaid premium, with interest as above remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of insurance."

At page 26 of the Mary E. Head record, there appears in the concluding portions of said Richard G. Head's application for these insurances, which is copied into each policy among the matters agreed to by them, the following:

4. *"That any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of the premium by said company of its authorized agent, during my lifetime and good health."*

This provision, as already stated, was in said Richard G. Head's application for the insurance, dated March 24, 1894, and although he gave a note to the soliciting agent personally for the premiums of the two policies, the giving of that note was not a payment of the premiums and the premiums were not paid until the return before the end of the thirty days for which the note was given of the policies, and when the policies were delivered to said Richard G. Head and he paid said premiums by taking up said note and paying the premiums, then the application and policies became binding contracts thus entered into and executed in the State of Missouri (Mary E. Head, Record p. 16).

Another contention of defendant in the cases is that, after the payment of the premiums on these policies for more than ten years, the insurances for $10,000 each on the two policies became lost by loan contracts entered into with it. The premium on each policy was $425 annually. The first premiums were paid on the delivery of the policies in April, 1894, and it is a conceded fact in the cases that the premiums were paid in April of each year thereafter down to and including April, 1904, so that there were eleven annual premiums of $425.00 on each policy paid by said Richard G. Head to defendant. In other words, there were total premiums amounting to $4,675.00 paid on each policy, or $9,350.00 altogether paid, and the correspondence between said Richard G. Head and defendant (Mary E. Head, Record p. 121) put in evidence by defendant, shows that said Richard G. Head had on these and other insurances paid $15,000.00 of premiums up to that time, to defendant. As before stated, the application for insurance by said Richard G. Head for these policies

showed that said Richard G. Head was carrying $30,000 other insurance with defendant. Notwithstanding the payment on these two policies of the above sum of $9.350.00 as premiums thereon, and notwithstanding said Richard G. Head was rapidly becoming an old man, and notwithstanding the insurances covered by said policies were worth in 1904 much more than said sum of $9.350.00 which had been paid as premiums thereon, defendant seems to be of opinion that it obtained a cancellation of these two $10,000 policies by obtaining contracts of loan with said Richard G. Head on said policies for $2,270.00 on each policy, or $4,540.00. The policy loan agreement relied on by defendant in the Mary E. Head case may be found at page 40 of the record in that case, and in Richard G. Head, Jr., case the policy loan agreement may be found at page 16 of the record in that case. Those policy loan agreements were made in June and July, 1904. *At the time of the making of those loan contracts in June and July*, 1904, *defendant had no branch office in New Mexico.* See evidence of Comptroller Anderson. (Mary E. Head Record p. 77). *The right to make and receive these loans was conferred in and by the policy itself in each case* (See Mary E. Head Record p. 21; Richard G. Head, Jr., Record p. 23).

Those provisions in the policy which stipulate for loans, read as follows:

> "Advances Within Accumulation Period.
>
> "The company will make advances as loans upon this policy at the fifth or any subsequent anniversary of the insurance within the accumulated period, under the following conditions:
>
> "First: That premiums are paid in full to the time when the loan is made, including the premium for the entire insurance year then beginning.
>
> "Second: That the aggregate amount of loans outstanding from the sixth to the tenth years, inclusive, shall not exceed $1100; from the eleventh to the fifteenth years, inclusive, shall not exceed $2270; and from the sixteenth to the twentieth years, inclusive, shall not exceed $3470.
>
> "Third: That the policy shall be duly assigned to the company as collateral security for the loans, and deposited at the Home Office.
>
> "Fourth: That interest at the rate of five per cent per annum shall be paid upon all such loans at the anniversary of the insurance next succeeding, and annually thereafter until the loans are paid off.

Fifth: That the loans shall be for such time as the borrower may elect, not longer, however, than to the end of the Accumulated Period.

"Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder."

These loans for $2,270.00 on each policy were made for those sums pursuant to the second paragraph of said loan provisions of the policy which provided that from the eleventh to the fifteenth year of the policy the holder thereof might borrow not exceeding $2,270.

It will be observed that said loan provisions of the policy do not contain any provision that said loan should be taken into account in determining the question of the amount of extended insurance, as contended for by defendant in its answer (Mary E. Head, Record p. 9), under Section 88 of Chapter 690 of the laws of 1892 of the State of New York pleaded therein.

Notwithstanding the foregoing provisions in regard to loans contained in the policies of insurance, defendant claims that the loan contracts entered into in 1904 were independent contracts standing by themselves, separate and apart from the contracts of the policies, and defendant makes this claim notwithstanding the contrary and opposing explicit decision in the case of *Burridge* v. *New York Life Insurance Co.*, 211 Mo. 158, l. c. 174-178, and other Missouri Supreme Court decisions.

Indeed the Cravens, Smith and Horton cases, *supra*, decided by the Missouri Supreme, and by this court, were all adjudged before the making of those loan contracts, and the Burridge case, followed the Cravens, Smith and Horton cases, holding in conformity therewith as being the settled law of Missouri; that loan contracts where made as in these cases pursuant to stipulations and provisions therefor contained in the policies, cannot change or convert Missouri contracts governable by the foregoing sections of our insurance laws, into New York contracts. Plaintiffs in these cases contend that the Missouri insurance laws, *supra*, and the above decisions in the Cravens, Horton and Smith cases make as strong a case of vested right in plaintiffs, and for the application of the maxim of *stare decisis* as could be found or considered.

Said loans were made within two years before the death of the said Richard G. Head. The record shows that plaintiffs first ob-

tained loans of $1100.00 on each policy in 1899. At that time all premiums to that date had been paid and no part of those loans were for any premiums on the policies. (Letter of S. B. Wood, Cashier, of defendant's office at Kansas City, of May 20, 1899. Mary E. Head, Record p. 63, Richard G. Head, Jr., Record pp. 42-43).

In 1904, the insured became entitled under the terms of the policies to loans, not exceeding in the aggregate $2270.00 on each policy, including the $1100.00 previously loaned in 1899 (Mary E. Head, Record p. 21, Richard G. Head, Jr., Record pp. 23-24). Thereupon application was made for a loan of $2270.00 on each policy and the loans for that amount were made, and were applied as shown by the letter of M. Kellogg, cashier of the appellant's branch office, of July 29, 1904, as follows, on each policy:

Outstanding loan,	$1100.00
April, 1904, annual premium	425.00
April annual premium, grace interest,	6.55
Interest in advance to April 3, 1905,	95.35
Premium lien note,	310.00
Interest on premium note,	4.80
	1941.70
Leaving amount paid in cash out of loan	328.30
Making the amount of loan,	$2270.00

(Mary E. Head Record, pp. 105 to 129, Richard G. Head, Jr., Record, pp. 71 to 96). It thus appears conclusively that no part of the loans of $2270.00 on each policy was for premiums

except April premium for 1904 of	$425.00
Interest thereon,	6.55
Premium lien note,	310.00
Interest thereon	4.80
Making,	$746.35

But for good measure at the trial, plaintiffs also included the item of $95.35, interest, in advance to April 3, 1905, making a total of $841.70 that might be considered as a part of premium indebtedness to be deducted from the net value of the policies when default occurred in paying the premiums for 1905. The record shows that after deducting the sum of $841.70 owing on account of premiums for three-fourths of the net value of the policies, there remained a net value of over $800.00, which applied as a single premium at the age of Mr. Head for temporary extended

insurance for the full amount of the policy, according to the Missouri Statutes of 1889, would continue the insurance in force for a period of three and one-half to four years, and long after the period of Mr. Head's death, which was on April 8, 1906. (Mary E. Head, Record, pp. 55-31-33; Richard G. Head, Jr., Record, pp. 45-49-51).

The burden of establishing that the loans were for unpaid premiums was upon the defendant, but there is no dispute as to the actual amount of such loans used for premiums, which has heretofore been stated.

One of the contentions of defendant is that in the Mary E. Head case she lost her insurance because, in May, 1905, she demanded a paid-up-policy. (Mary E. Head Record, p. 41.) That request reads as follows:

"May 3, 1905.

"The New York Life Insurance Company is hereby requested to endorse policy No. 599690 for $599690 this being the amount of paid-up insurance payable in accordance with the terms of the policy.

Richard G. Head, Insured.
Mary E. Head, Beneficiary Assignee.
Wm. G. Haydon, Witness."

It appears that after the sending of that request to defendant, it made the endorsement on the policy held by said Mary E. Head that she was entitled to $89. The uncontradicted evidence is that that sum has never been paid to or received by the plaintiff in that case and that she has steadfastly refused to receive the same, she being unwilling to cancel an indebetedness for which her judgment in this case was given for about $7,500.00, on the payment of $89. At the time of the request and on April 3, 1905, a month prior to the making of that request, the evidence in the case shows that the net value of Mary E. Head's policy was $2,284.50 and that was the amount, according to the Missouri statutes which govern the case, that was applicable as a single premium for extended insurance. And the evidence of the experts in the case, J. B. Reynolds and F. B. Mead, show that that amount was sufficient to purchase extended insurance for the full amount of the policy, viz., $10,000.00, three or four years after April, 1905.

It is admitted that said Richard G. Head died in April, 1906. (Mary E. Head Record, p. 8.) The evidence of said experts showing the above facts may be found in the Mary E. Head Record, pp. 31-42-101-64).

The testimony shows that if a paid-up policy had been issued by the defendant, in accordance with the Missouri Statute, it should have issued for about $3,000 instead of $89.

The exact amount of a paid-up policy that the company should have issued appears from the testimony of Mr. Reynolds at page 44 of the Mary E. Head Record, as follows:

> "A. It would purchase a paid-up-policy at the published rates of the company used at that time of $2873.08."

When said plaintiff, Mary E. Head, made said application for a paid-up policy, she had no knowledge of the value of the policy. This appears from her evidence at page 58 of the record in her case, which as as follows:

"Re-Direct Examination by Mr. Deatherage.

"Q. How old is your brother Richard G. Head?
A. 16 years old the 16th of last November.
Q. November, 1907?
A. Yes, sir.
Q. At the time that you made the application introduced in evidence for a paid-up policy, did you know what was the value of that policy which has been introduced in evidence?
A. I did not.
Q. Did you know anything as to its cash value?
A. No, sir.
Q. Had you any knowledge as to how much paid-up insurance you were entitled to?
A. Not in the least.
Q. Did you learn at any time prior to the death of your father what was the value, the cash value of that policy or the amount of paid-up insurance to which you were entitled.

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant, and moreover the fact has appeared here that this witness received back this policy with amount of paid-up insurance, and it is calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

Q. (Question read to witness):
A. No, I did not.
Q. Then when you made application for the policy, paid-up policy, did I understand you, that you had no knowledge as to what its actual value was or what amount of paid-up policy of insurance you were entitled to?

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant and calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

A. No, sir.
Q. And you had no such knowledge until after your father's death?

Mr. Pratt: Objected to by the defendant as incompetent, irrelevant and calling for immaterial testimony.

By the Court: Objection overruled; defendant then and there duly excepting.

A. No, sir.
Q. Why did your father not pay the premiums due on this policy in April, 1905?

Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: If she knows why he did not pay it.

Defendant then and there duly excepting.

Q. (by Mr. Deatherage) Why didn't he pay it?
A. He did not have anything to pay it with.
Q. On account of his financial condition?
A. Yes, sir."

Under the provisions of the last half of said Section 5857 of the Mo. Rev. Stat. 1889, relative to paid up policies, the amount of the paid up policy in this case would be for eleven-twentieths of the face of the policy or $5500, there having been eleven of the twenty annual premiums paid.

This point which arose in the Mary E. Head case, to the effect that she lost her insurance by the endorsement of said amount of $89 thereon, does not arise in the Richard G. Head, Jr., case.

BRIEF OF THE ARGUMENT.

I.

The defendant, although a foreign corporation created and existing under the laws of the State of New York, came into Missouri under its license and permission, and made the contracts of insurance sued upon in these actions, in the State of Missouri, with the same force and effect and subject to the insurance laws of Missouri the same as if it had been and were a corporation created under the laws of Missouri instead of the laws of New York, and for the purposes of this case defendant must be taken to be the same in all respects as a Missouri corporation.

Our corporation laws in force when defendant obtained its license to do business in Missouri provides that every foreign corporation doing business in that state shall have and maintain a public office therein for the transaction of its business, and said section contains specifically the following language:

> "And such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."
>
> Missouri Session Laws 1891 page 75, Sec. I.

II.

The contracts in these cases having been entered into in Missouri, have the same legal effect and force as if said Richard G. Head had lived in Missouri, in which state he was born, instead of living in New Mexico, at the time of making these contracts. The people of all the states and territories of the United States have the right to buy and sell real estate in Missouri, own property therein and enter into contracts therein, the same as citizens and residents of Missouri.

By Section 748 of the Statutes of Missouri, regarding aliens, Vol. 1, Revised Statutes of Missouri of 1909, p. 355, even aliens may acquire real estate in that state, the same as if they were citizens of the United States and residnts of that state.

Section I, Article XIV of Amendments to the Constitution of the United States, provides as follows:

ARTICLE XIV.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under this paragraph of the Federal Constitution, said Richard G. Head and the plaintiffs in these actions claiming under him have the same contract rights under these policies of insurance, obtained and issued in the State of Missouri, that they would have if Mr. Head and his family had lived in Missouri, where he was born, instead of living in the Territory of New Mexico. There is nothing either in the legislative or judicial history of Missouri that warrants counsel to make any claim to the contrary. There is nothing in the judicial utterances either of the Supreme Court of Missouri or of any of its courts of appeals which hold that property rights as to real or personal property in Missouri, or contract rights, were or are any different where those property or contract rights are owned or claimed by a non-resident of Missouri than if he were a resident of that state. The imputation of defendant's counsel is a calumny on Missouri and on her legislative and judicial history. Defendant's counsel practically admit that if said Richard G. Head had resided in Missouri when these contracts were made in April, 1894, the insurance company would be without any defense, and the only claim of counsel seems to be the proposition that a recovery cannot be had on these policies, because said Richard G. Head did not live in Missouri at the time of these transactions. Since said Richard G. Head was not a corporation he had the absolute right to do business, acquire property and acquire vested rights under contracts made pursuant to Missouri laws, all in the State of Missouri, the same as could be acquired by the citizens of Missouri. Instead of living in Missouri where he was born and running his ranch from his home in Missouri he chose to live on his ranch.

Under said 14th Amendment Mr. Head and these plaintiff children were guaranteed the same right as if they had lived in Missouri.

Yick Wo v. *Hopkins*, 118 U. S. 356-369.
R. W. Co. v. *Mackey*, 127 U. S. 205, l. c. 209.
Duncan v. *Missouri*, 152 U. S. 377.
Frazer v. *McConway Co.*, 82 Fed. 257.
Templar v. *Bankers Board Ex.*, 131 Mich. 254.
Steed v. *Hamey*, 18 Utah, 367.
Pearson et ux. v. *City of Portland*, 69 Maine, 278.

III.

The question of the situs of contracts in cases where the question of their validity depends upon the laws of the state where they are made does not depend upon the residence of the parties. If two citizens of Iowa and Illinois come into Missouri and buy a parcel of real estate or personal property situate in Missouri or make any other contract in Missouri, the contract rights of the parties are governed by the laws of Missouri, the same as if either or both lived in Missouri. This question was decided in an insurance case by the Supreme Court of New York. We refer to the case of *Napier* v. *Bankers Life Insurance Co.* of the City of New York, 100 N. Y. Supp., 1072. In that case the point we contend for was adjudged as follows:

> "Where a policy of life insurance was signed and delivered in the City of New York, and provided for the payment of premiums to the company and the amount of the policy by the company to be made in that city, at the Home Office, after receipt of satisfactory proofs of death, it is a New York contract, though the insured resided in another state."

The insurance company in that case was a New York company. The company in the case relied upon the New York statute as a defense. The assured in that case was a citizen of Chicago, Ill. The question in the case was whether the New York statute relied upon by the insurance company as a defense in the case governed the case, the insured having been a citizen of Chicago, Ill. The court held, as already appears, that the contract was a New York contract, although the assured lived in Illinois. And in the opinion in the case, disposing of the point and holding that it was a New York contract, the court uses the following language:

"The policy was issued upon the life of a man residing at the date of the issuing thereof, in the City of Chicago, in the State of Illinois; and, so far as the evidence in this case shows, that continued to be his residence up to the date of his death. If this policy is to be construed as an Illinois contract, the statute above referred to would not apply. *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; *Mutual Life Ins. Co. of New York* v. *Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. Notwithstanding the fact that the policy was written upon the life of a person residing out of the State of New York, I am of the opinion that, upon the evidence in this case, the contract must be deemed to be a New York contract. The policy purports to be signed and delivered at the City of New York."

The following cases illustrate that the courts do not consider the residence of the parties as having any influence in determining the place where a contract is made.

Milliken v. *Pratt*, 125 Mass. 374.
Golden v. *Ekerb*, 52 Mo. 260.
Richardson v. *DeGinesville*, 107 Mo. 422.
Ruhe v. *Byck*, 124 Mo. 178.
Reed v. *Telegraph Co.*, 135 Mo. 661.
Horton v. *New York Life Ins. Co.*, 151 Mo. 604.
Elliott v. *Des Moines Life Ass.*, 163 Mo. 132.
Thompson v. *Traders Ins. Co.*, 169 Mo. 12.
Park v. *Conn. Fire Ins. Co.*, 26 Mo. App. 511.
Clothing Co. v. *Sharpe*, 83 Mo. App. 385.
Pietri v. *Seguenot, Admr.*, 96 Mo. 258.

IV.

The contention of defendant's counsel that its offer to pay $89.00 to satisfy a liquidated indebtedness for which the judgment was given for about $7500.00 and that that offer of $89.00 extinguishes plaintiff's liquidated demands, is not supported by anything in the law.

1 Cyc. Law & Proc., 319.

The author of the article on "Accord and Satisfaction" in that authority, thus correctly states the rule on this subject:

"V. METHODS OF ACCORD AND SATISFACTION.

"A. Part Payment. 1. *Liquidated Debt.* a. Necessity of New Consideration. (1) *Statement of General Rule.* Where the debt or demand is liquidated or certain and is due,

payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefor notwithstanding the agreement."

Very many authorities from all of the states and from the Federal Courts and the courts of England and Canada are cited by the author in support of the above proposition. Among the many authorities thus cited is the case of *Wetmore* v. *Crouch*, 150 Mo. 671-672-682-683. The proposition adjudged in that case on this point, as appears from point 6 of the syllabus therein, is thus stated:

"6. Accord and Satisfaction. The payment of a smaller sum than is unquestionably due, and which has no other element of accord in it than mere payment, is not a satisfaction of the debt even though accepted as such at the time."

At p. 683 the court in its opinion said:

"A transaction which consists only in the payment of a smaller sum than is unquestionably due, and which has no other element of accord in it, is not a satisfaction of the debt even though accepted as such at the time. *Riley* v. *Kershaw*, 52 Mo. 224; *Swofford Bros. D. G. Co.* v. *Goss*, 65 Mo. App. 55."

The testimony of the plaintiff, Mary E. Head, shows that she had no knowledge of the value of the policy at the time of the tender of $89.00 made by appellant and that she never knew what she was entitled to until after the death of her father. Furthermore she never agreed to take said $89.00 in satisfaction of $7500.00 or thereabouts that was due her on the death of her father for which her judgment herein was given and never did accept or receive $89.00 or any other sum in settlement of the policy. This point does not arise in the Richard G. Head, Jr. case.

V.

The claim in the Mary E. Head case that the endorsement of said $89.00 by appellant on said Mary E. Head policy was the same as a paid-up policy issued under Section 5857 of the Revised Statutes of Missouri of 1889, cannot be sustained. Said $89.00 was not

the amount due as a paid-up policy on said Mary E. Head policy by virtue of said Section 5857 of the Missouri Revised Statutes, but said $89.00 under the evidence adduced by defendant was the amount claimed by it to be the entire amount due as a paid-up policy under the laws of New York. There was no new policy issued by defendant under Section 5857 of the Revised Statutes of Missouri. Defendant cannot claim under both the statutes of New York and Missouri. Its claim that $89.00 satisfied the Mary E. Head policy demand is made under the laws of New York. If the policy was a Missouri contract, then it is governable by the law of Section 5857 copied in our foregoing statement. That section provides how a paid-up policy in cases like this may be issued, but that section was not followed by defendant. Defendant can hardly claim that it followed the Missouri statute above cited, with respect to the form of the transaction in issuing a paid-up policy, but that it followed the New York statute in ascertaining the important part of the amount due on a paid-up policy. The case of *Cravens* v. *Ins. Co.*, 148 Mo. 583, is decisive of the point that defendant did not comply with the above Missouri statute in regard to the issuance of said paid-up policies in these cases.

The above case of Cravens was affirmed by this court. *Ins. Co.* v. *Cravens*, 178 U. S. 389. This point does not arise in the Richard G. Head No. 255 case.

VI.

The proposition that these policies were and are Missouri contracts are amply supported by the following authorities:

Cravens v. *Insurance Co.*, 148 Mo. 583.
Ins. Co. v. *Cravens*, 178 U. S. 389.
Equitable Life v. *Clements*, 140 U. S. 226.
Whitfield v. *Ins. Co.*, 205 U. S. 489.
Moore v. *Ins. Co.*, 112 Mo. App. 696.
Ins. Co. v. *Russell*, 77 Fed. Rep. 94, 23 C. C. A. 43.
Ins. Co. v. *Tweyman*, 92 S. W. 335.
Capp v. *Ins. Co.*, 94 S. W. 734.
Horton v. *Ins. Co.*, 151 Mo. 604.
Joyce on Ins., Sec. 194.
Napier v. *Ins. Co.*, 100 N. Y. Supp. 1072.
Burridge v. *Ins. Co.*, 211 Mo. 158-178.

VII.

Equally erroneous is defendants' proposition that the loan contracts of 1904 had the effect of wiping out the policies.

Smith v. *Insurance Co.*, 173 Mo. 329, l. c. 341-342-343.
Burridge v. *N. Y. Life Ins. Co.*, 211 Mo. 158, l. c. 178; 109 S. W. Rep. 560.
Cristensen v. *N. Y. Life Ins. Co.*, 152 M. A. 551; 134 S. W. 100.

These authorities are conclusive of the proposition that the act of the Missouri Legislature of 1903 authorizing such loan contracts as were made in these cases, does not apply to these cases, because that act only operates prospectively and not retroactively or retrospectively. That act only applies to policies issued thereafter, that is, after 1903.

VIII.

In these cases, the policies having contained provisions and stipulations for the making of loans and loan contract, these loans and loan contracts made in 1904 cannot be considered as separate loans and loan contracts. This was explicitly decided in the case of *Burridge* v. *N. Y. Life Insurance Co.*, 211 Mo. 158. See also to the same effect, *Christensen* v. *N. Y. Life Ins. Co.*, 152 Mo. App. 551. This latter case was the same as the case of *Burridge* v. *N. Y. Life Ins. Co.*, *supra*, and the same ruling was made by the court in that case.

The policies in these cases, having been issued in Missouri and having been at the time of their issue in 1894 Missouri contracts, and the loan contracts of 1904 having been made pursuant to and in execution of the loan provisions and stipulations of the policies, the rights of the parties respecting said loan contracts were not different from what their rights were as fixed by the policies themselves when they were issued containing the provisions for said loan contracts. And both of the cases of Burridge and Christensen, were decided upon the basis that the loan contracts in cases of this kind where there are provisions and stipulations in the policies for the loans, must be held as governable by the law in force at the time of the issuance of the policies.

IX.

The point that these policies must be taken to have been delivered when they were mailed from New York, cannot be sustained. The decision in the case of *Horton* v. *N. Y. Life Ins. Co.*, 151 Mo. 604, is precisely in point. That case is exactly parallel with these. In that case the court, in an elaborate opinion delivered by Judge Valliant, held that the policy in that case, although mailed from New York did not by such mailing become a contract, because it was not mailed to the policy holder, but was mailed to the branch office of defendant for delivery by defendant's branch office to the policy holder upon the payment of the premium. The remarks of the court in its opinion upon this point commence at page 619.

X.

Respecting the suggestion and argument of counsel that defendant had the right to come into Missouri and make contracts in defiance of law, we submit that the right of contract is not an unlimited, unqualified one, but is always subject to the law in force at the time of making the contract.

Wilson v. *Drumrite*, 21 Mo. 325.
Villa v. *Bodrigues*, 12 Wall. 339.
State ex rel. v. *Fireman's Fund Ins. Co.*, 152 Mo. 1.
State v. *Cantwell*, 179 Mo. 245.
Holden v. *Hardy*, 169 U. S. 366.
Karness v. *Insurance Co.*, 144 Mo. 413.
Havens v. *Insurance Co.*, 123 Mo. 403.
Henry v. *Evans*, 97 Mo. 47.

These decisions all proceed upon the theory that where the relation of mortgagor and mortgagee, pledgor and pledgee, insurance company and insured, or other like fiduciary relations subsist between the parties, legislation forbidding or governing the subject of contracts is permissible and sustainable. The relation between an insurance company and a policy holder is certainly fiduciary in its character, and is one that courts have more than once decided to call for the protection of the Legislature by such wholesome legislation as lies at the foundation of these actions. That principle was recognized and solemnly adjudged in the case of *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Mo. 329, in the Cravens cases, and also by *Mutual Life Ins. Co.* v. *Twyman*, 92 S. W. Rep. 335, which was decided by the Kentucky Court of Appeals. This same principle was recognized by the decision of the United States Circuit Court of

Appeals of the Sixth Circuit, in the case of *Narramore* v. *Ry. Co.*, 96 Fed. Rep. 298; 37 C. C. A. 499. In that case there was a statutory provision for bidding unblocked switches in railway yards. The plaintiff was injured because of such unblocked switches. The case was from Ohio. It was contended by the railway company that the plaintiff servant had assumed the risk of the absence of the unblocked switch which the statute required. The trial court gave judgment for the railway company, but this judgment was reversed in the court of appeals. The court of appeals held that the doctrine of assumption of risk rests upon contract, and that the servant and the railway company, by reason of the relation of the parties, could not contract away the obligation and positive duty of the railway company to furnish a blocked switch, as the statute required.

In the opinion in the case, the United States Circuit Court of Appeals used the following language:

> "If, then, the doctrine of assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute."

The court recognized this principle as applicable to insurance contracts in the case of *Andrus* v. *Fidelity Mutual Life Ins. Association*, 168 Mo. 151. Thus in point 4 of the syllabus it was adjudged as follows:

> "Owing to the nature of insurance companies and the character of their contracts, they naturally and properly belong to a class unto themselves and must be governed by laws that would be wholly inappropriate to any other company or to any other contracts."

See also *Ins. Co.* v. *Daggs*, 172 U. S. 557, 562.

ARGUMENT.

I.

The application for insurances in these cases having been made and delivered by the assured to the defendant at its agency in Kansas City, Missouri, and the policies sued on having been delivered to the assured by defendant's agent in said Kansas City, Missouri, and the first premium having been paid to defendant's agent in Kansas City, Missouri, and all of the business resulting in the final completion of the contracts of insurance having taken place in Kansas City, Missouri, it results that, under the decisions of the Missouri Supreme and Appellate Courts, and under those of the Supreme Court of the United States, the contracts in suit must be taken as Missouri contracts and not contracts governable by the laws of New York.

Cravens v. *Insurance Co.*, 148 Mo. 583.
Insurance Co. v. *Cravens*, 178 U. S. 389.
Equitable Life v. *Clements*, 140 U. S. 226.
Whitfield v. *Insurance Co.*, 205 U. S. 489.
Smith v. *Mutual Benefit Life Insurance Co.*, 173 Mo. 329.
Moore v. *Insurance Co.*, 112 Mo. App. 696.
Insurance Co. v. *Russell*, 77 Fed. Rep. 94; 23 C. C. A. 43.
Insurance Co. v. *Twyman*, 92 S. W. 335.
Capp v. *Insurance Co.*, 94 S. W. 734.
Horton v. *Ins. Co.*, 151 Mo. 604.
Joyce on Ins. Sec. 194.
Napier v. *Ins. Co.*, 100 N. Y. Supp. 1072.
Burridge v. *Ins. Co.*, 211 Mo. 158-178.

It is contended that a different rule arises in these cases as to whether the contract is a Missouri contract or not, from the fact that Mr. Head was not a citizen of Missouri, but a citizen of New Mexico.

We do not think that makes any difference in the case. If the decisions and authorities on the subject of conflict of laws growing out of the question whether a given contract is a contract of one state or another state, are consulted, it will be found that the question of residence or citizenship of the parties is not an element determining or controlling the decisions.

In these cases, the defendant insurance company was a corporation and a citizen of the State of New York, and we suppose that the question whether this contract is a Missouri contract is not affected by the consideration that the Insurance Company was or was not a corporation and citizen of New York. If a citizen of Missouri goes to the State of Iowa to buy a parcel of real estate owned by a citizen of Illinois, we suppose that the contract resulting in the sale of that land, is an Iowa contract governable by the laws of that state. The state and place where the transaction occurs usually determines the *lex loci contractus*, as it is called in the books. The law of the place where the contract is made governs, in the determination of its validity and its construction, and enters into and becomes a part of the contract. *Scudder* v. *Bank*, 91 U. S. 406.

If a citizen of Topeka, Kansas, were to write to a citizen of Kansas City, Missouri, or St. Louis, Missouri, to have ten gallons of gin or other liquors shipped from Missouri to Kansas, and those liquors were shipped, the decisions of the Kansas Supreme Court, which are in harmony with the general current of authority, hold that that is a Missouri contract governable by the laws of Missouri. Why? Not because a citizen of Topeka does or does not live in Kansas, or does or does not live in Missouri, but because the transaction is consummated when the liquor is shipped and put on the cars in Missouri for shipment to Kansas. That is the crowning act which makes the negotiations of the parties a contract. The crowning act in the cases at bar was the delivery of the policies, pursuant to Mr. Head's application, to him in Kansas City, Missouri, and the payment at that place of the first premiums.

In this connection, it will be noted that the policies sued on were not mailed from New York to Mr. Head, but were sent by the company to its agent in Kansas City, to be by its agent delivered to Mr. Head, the assured, in Kansas City, Jackson County, Missouri, where they were delivered to him. Of course until each policy was delivered in Kansas City, Jackson County, Missouri, by defendant's agent, it was still under the control of the defendant and was in no way a completed, consummated binding contract. When it was delivered it became such a contract.

Horton v. *Ins. Co.*, 151 Mo. 604.

A great number of cases might be cited to the court on this branch of the case. Counsel on the other side do not cite any

case holding that the residence or citizenship of the parties to the contract furnish a test by which to determine where the contract was made or what law should govern it. The law of the state where the contract was made governs, and if that law makes the contract valid, the contract is valid. If, on the other hand, that law renders the contract void, or certain provisions of the contract void, then that contract is accordingly void, and it will not be enforced in the courts of another state, even though the laws of the latter state may not render the contract invalid. In other words the contract will or will not be enforced accordingly as it is valid or invalid, by the laws of the state in which it was made, regardless of the residence of the parties.

An instructive opinion was delivered by Chief Justice Gray of the Massachusetts Supreme Court, (afterwards one of the Justices of this Court), in the case of *Milliken* v. *Pratt*, 125 Mass. 374. We do not cite this case because it is special in its character, but it is one of a great number of cases that might be cited upon the point that the validity of contracts in this class of cases must be determined by the law of the place where the contract was made, irrespective of the residence or citizenship of the parties.

In that case, it was held that the validity of a contract, even as regards the capacity of the parties, is generally to be determined by the law of the state in which it was made. In that case, an inhabitant of Massachusetts bought goods in Portland, Maine. The goods were ordered by letter mailed in Massachusetts and they were delivered to a carrier in Maine for the citizen in Massachusetts who made the order. The question as in a number of other cases, was whether the contract was a Maine or Massachusetts contract. The court, by Chief Justice Gray, held that it was a Main contract governable by the law of that state, notwithstanding the residence of one of the parties in Massachusetts.

II.

We desire to call attention to some of the cases in support of the proposition that the phrase *lex loci contractus*, or in other words the question of the place of making a contract and the place of the laws which govern the construction, interpretation and validity of a contract, do not involve the consideration of the residence of the parties; and that the fact that the policies in these cases were *lex loci contractus* in the State of Missouri, is the same as if Mr. Head had resided in Missouri instead of New Mexico.

The case of *Depas* v. *Mayo*, 11 Mo., 314, recognizes the rule which everywhere prevails, that as regards real estate contracts, the law of the place where the land is situated governs.

In the opinion in that case, Judge Napton, speaking for the court, says:

> "The removal of Depas and his wife from Louisiana to this state does not alter the character of this transaction. Had Depas, while residing in Louisiana, remitted a sum of money belonging to the community and procured its investment in Missouri lands, would the rights of the parties in Louisiana have been changed. What difference can it make that, previous to the investment the parties had changed their domicile? The bill assumes that the purchase of lots in St. Louis was not an acquisition here, but a mere investment of money previously acquired in Louisiana.

In the case of *Houghtaling* v. *Ball*, 19 Mo. 84, the court held as follows:

> "The fact that wheat contracted to be sold and delivered in Illinois is to be held up on its arrival in Missouri, will not subject the contract to the operation of our statute of frauds."

In that case, the contract for the sale of the wheat was made and the wheat was delivered at Chicago, Ill. The sale and delivery was to the defendants through their agent at Chicago. The wheat was shipped to the defendants at St. Louis. The court held that the laws of Illinois, where the contract and delivery were made, alone operated on the agreement, and it was not considered that the residence of the parties had anything to do in determining the question of *lex loci contractus.*

See also the same case, in *Houghtaling* v. *Ball*, 20 Mo. 563. There is a statement of facts in this latter report of the case from which it appears, inferentially at least, that the plaintiff did business at Chicago and the defendants at St. Louis. It was held by the court that the statute of frauds of Illinois, and not the statute of Missouri, governed the case, and the fact that one of the parties resided in Illinois and the other in Missouri, was not considered by the court as having any influence in determining the question of *lex loci contractus.*

The case of *Golson* v. *Eberi*, 52 Mo. 260, is to the same effect. That case originated in the St. Louis Circuit Court. The plaintiffs were partners doing business in New Orleans, La. The defendants

did business and resided in St. Louis. The defendants, by their agent in New Orleans bought certain merchandise from plaintiff. The goods were to be and were delivered in New Orleans to and through the agent of defendants. The court held that the contract was governable by the laws of Louisiana, where the contract was made and fulfilled, and not by the laws of Missouri, where the suit was brought and defendants resided (See p. 272). And the fact in that case, that one of the parties to the suit resided in Louisiana and the other in Missouri, was not mentioned or considered by the court as having any influence upon the question of *lex loci contractus.*

In the case of *Schell* v. *Inc. Asso.*, 150 Mo. 103, the court held the following:

> "The statutes of this state governing building and loan associations form a part of the contracts between the association and its borrowing members, and should be so read into the contract as to prevail over their language if such language is in conflict therewith."

The contract in that case was with reference to a loan made by deeds of trust on real estate in Springfield, Mo., but it was not considered as having any influence upon the question in the case, where the parties in the case or either of them resided.

See also *Johnston* v. *Gawtry*, 11 Mo. App. 322, l. c. 331-332.

In the opinion given by the St. Louis Court of Appeals in that case, the court, at pp. 329-330, says:

> "We are of opinion that upon the pleadings and evidence, plaintiff was entitled to the decree. The note was perhaps signed by Mrs. Gawtry in New Jersey, and she probably resided there at the time. The general rule, however, is that the place where a contract is made, depends, not upon the place where it is written, but in the place where it is delivered as consummating the bargain. There is no doubt that the place of the contract therefore was New York."

In the case of *Parks* v. *Conn. Ins. Co.*, 26 Mo. App. 512, the St. Louis Court of Appeals adjudged as follows:

> "The local laws of a state form a part of contracts entered into in such state, which contracts are subject to provisions of such laws rendering void certain clauses, if contained in such contracts."

That was a suit in a Missouri court by a citizen of Texas, against the insurance company, which was a Connecticut corporation. It was a case of a fire policy on property in Texas. The contract in the case was treated and held by the court as a Texas contract. The question of the citizenship of the parties in Texas and Connecticut was not considered or held by the court as having any influence upon the question of *lex loci contractus.*

In the case of *Phoenix Mutual Life Ins. Co.* v. *Simons,* 52 Mo. App. 357, the Kansas City Court of Appeals adjudged the following propositions:

> "The validity of a contract—whether as to the form or manner of its execution, or as to the capacity of parties—should be determined by the law of the state where the same is entered into, and, if valid there, it is valid elsewhere; and this rule alike governs the disabilities of coveture, infancy, etc.
>
> "A note made by a married woman, dated in Kansas, executed in Missouri, was sent to and delivered in Kansas. *Held,* a Kansas contract, as it was the delivery that completed the contract and gave it life; and it, therefore, bound the maker according to the laws of Kansas, which would be enforced in the Missouri courts."

The insurance company in that case was a Connecticut corporation, with its principal place of business at Hartford, Conn. The agent of the insurance company was a concern at Ft. Scott, Kansas. The defendant and her husband lived at Nevada, Mo. The controversy between the parties seems to have been over a loan for $1,200.00, made by the defendant through the Ft. Scott agency of the plaintiff Connecticut corporation. The defendant was a married woman, and the question in the case seems to have been whether her note was a Kansas or Missouri contract. The court seems to have held that it was a Kansas contract, but neither the residence in Connecticut of the insurance company or the residence of defendant in Missouri, were considered or held by the court as having any influence or significance upon the question of *lex loci contractus* in the case. In the opinion of the court the following language is used:

> "Now, in our opinion the facts above stated show this note to have been made in Kansas and not in Missouri. The instrument is dated at Fort Scott, Kansas, was signed at Nevada, Missouri, but *delivered* to the plaintiff at Fort Scott, Kansas. It then became a completed contract at its *delivery,*

and not before. The mere signing of the paper did not make or locate the contract. It was the subsequent delivery that first gave it life. Until the instrument signed at Nevada, Missouri, had reached the plaintiff's agent at Fort Scott and was by them received and approved the contract was incomplete. Before that there was no perfected obligation because no delivery. The solicitor at Nevada had no authority to pass on the paper, he was a mere conduit or middle man through which the parties negotiated. He only took the note, after it was signed at Nevada, and passed it to the company at Fort Scott for their action. The delivery was only complete when these agents of the plaintiff in Kansas received it. It was these agents at Fort Scott who had authority from the plaintiff to close up the loan, and pay the money. They did receive the note sent to them from Nevada, Missouri, and then consented to and did pay over the money which they had been authorized to loan. The *lex loci contractus* was then fixed. It was at Fort Scott, Kansas, and not at Nevada, Missouri. The foregoing propositions are amply supported by eminent judges and text-writers. *Miliken* v. *Pratt*, 125 Mass. 375, and cases cited; *Hill* v. *Chase*, 143 Mass., 129; *Gay* v. *Rainey*, 89 Ill. 221, 225; *Butler* v. *Meyer*, 17 Ind. 77; *Bell* v. *Packard*, 69 Me. 105; *Lawrence* v. *Bassett*, 5 Allen, 140; *Baum* v. *Birchall*, 24 Atl. Rep. 620; *Thompson* v. *Ketcham*, 8 Johns (N. Y.) 190; *Greenwood* v. *Curtis*, 6 Mass. 377; *Scudder* v. *Bank*, 91 U. S. 406, 412; Storey on Conflict of Laws (8 Ed.), 842; *Stix* v. *Matthews*, 63 Mo. 373.

Judgment reversed and cause remanded. All concur."

So, in the case of *Hauck Clothing Co.* v. *Sharpe*, 83 M. A. 385, the court held as follows:

"It is the general rule that in conflict of laws, matters connected with the performance of a contract are regulated by the law of the place of performance. But the *lex loci contractus* generally governs as to the validity and the construction of the contract and the capacity of the parties to make it, unless made by special reference to the laws of the place of performance, or concerning real estate."

In the opinion in that case, the St. Louis Court of Appeals, by Judge Bland, used the following language:

"The evidence is that the common law of coveture is in force in Indiana. If the note is an Indiana contract, then it is void for want of legal capacity in Mrs. Sharpe to bind herself personally, by signing her name to the note. Under the laws of Missouri defendant had legal capacity to make the note. The learned circuit judge decided that the note was

an Indiana contract. How the law of Indiana, as to the legality of the note can be applied, it is difficult to see, in view of the fact that the note was made in Missouri, and the suit to enforce its collection was brought here. 'A contract is made when both parties agree to it. If the offer is made by letter, then it is made where the party receiving the proposition puts into the mail his answer accepting it, or does any equivalent act,' says Prof. Parsons (2 Parsons on Contracts, p. 582); *Glass Company* v. *Taylor et al.*, 34 S. W. Rep. loc. cit. 712. When in answer to W. W. Sharpe's request the defendant signed the note and put it in the mail at Pike County, Missouri, addressed to her son, the contract was made, and made in Missouri, to be performed in Logansport, Indiana. It is the general rule that in conflict of laws, matters connected with the performance of a contract are regulated by the law of the place of performance. *Brown* v. *Birchall*, 150 Pa. St. 164; but the *lex loci contractus* generally governs as to the validity and the construction of the contract and the capacity of the parties to make it, unless made with special reference to the place of performance, or concerning real estate. Thus in *Ruhe* v. *Buck*, 124 Mo. 178, it was held that matters bearing on the execution, the interpretation and validity of a contract are determined by the law of the place of its execution, and that matters respecting the remedy such as bringing suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where suits are brought, following *Scudder* v. *Bank*, 91 U. S. 406, wherein it was held as to a bill of exchange drawn by a party in Chicago upon a firm in St. Louis and verbally accepted by a member of the firm then in Chicago, that the validity of the acceptance was to be determined by the laws of Illinois. To the same effect is *Richardson* v. *DeGiverville*, 107 Mo. 422; *Forepaugh* v. *Railroad*, 128 Pa. St. 217; *Curnaze* v. *Ins. Co.*, 37 S. C. 406; *Miller* v. *Wilson*, 146 Ill. 523; *Ins. Co.* v. *Force*, 142 N. Y. 90. The same rule is applied to the contracts of married women. *Milikin* v. *Pratt*, 25 Mass. 374; *Holmes* v. *Reynolds*, 55 Vt. 39; *Bond* v. *Cummings*, 70 Maine, 125; *Taylor* v. *Sharpe*, 108 N. C. 377."

Throughout the opinion Judge Bland did not consider or hold that the residence of the parties had anything to do with the *lex loci contractus*. Indeed, the very phrase *lex loci contractus* excludes the idea that anything but the *place* of making the contract has anything to do with the question.

In the above case, at p. 592, Judge Bland cites approvingly the above case of *Insurance Co.* v. *Simons*, 52 Mo. App. 357.

In the case of *Summers* v. *Fidelity Mutual Aid Asso.*, 84 Mo. App. 605, it appears that the defendant association was a California insurance company doing business in Missouri, under the laws thereof, the same as the defendant, New York Life Insurance Company, in these cases. The Kansas City Court of Appeals which decided the case, adjudged the following proposition:

> "An insurer organized under the laws of California where the contractual limitation for bringing suit is valid though less than the statutory period, provided in its application signed by the assured that the contract should be a California contract. In fact the contract was made in Missouri where the insurer was licensed to do business. *Held*, Insurer cannot introduce into its policies terms which are forbidden such corporations by Missouri laws."

In the case of *Herf Chemical Co.* v. *Lackawanna Line*, 100 Mo. App. 164, l. c. 179, the St. Louis Court of Appeals held as follows:

> "Where a contract of shipment is made in Missouri between a resident corporation of that state and a carrier having an office and doing business there, such contract is governed by the laws of that state, and the carrier is not required to notify the consignee of the arrival of the shipment after it arrives at the destination on time."

In that case, the plaintiff, chemical company, sued the defendant railroad company because of the negligence of the carrier in failing to notify the consignee of the arrival of a shipment. If the contract was made in the State of Missouri where the shipment was made, the notice was not required on the part of the carrier. The shipment was from St. Louis to New York City, and was to be delivered to a corporation in said New York City.

In the opinion (p. 179) the court said:

> "No notice to the consignee of the arrival of the goods, shipped by railway, is required under the laws of Missouri, where the shipment arrives on time. *Gashweiler* v. *Railroad*, 83 Mo. 119, and authorities cited. The contract of shipment was made in Missouri, between a resident corporation of Missouri and a corporation having an office and doing business in Missouri, and is governed by the laws of Missouri. *Gunter* v. *Bennett*, 39 Tex. 303; *Robinson* v. *Merchants Dispatch Co.*, 45 Iowa, 470; *Pennsylvania Co.* v. *Fairchild*, 99 Ill. 260; *First National Bank* v. *Shaw*, 61 N. Y. 283."

In the case of *Dennis* v. *Modern Brotherhood of America,* 119 Mo. App. 210, The Kansas City Court of Appeals decided as follows:

> "Where a society is organized in one state and permitted to do business as a foreign corporation in another state the statute of the latter will determine who can be beneficiaries in causes originating therein."

In the opinion in the case, at p. 214, Judge Ellison, who wrote the opinion of the court, says:

> "In cases where a society may depend for its power to do business on the statutes of two states, one where it is organized, and the other wherein it is permitted to do business as a foreign corporation, the statute of the latter will control as to who can become beneficiaries in cases originating in the latter." Citing *Baltzell* v. *Modern Woodmen,* 98 M. A. 153.

In the case of *Crossman* v. *Lurman,* 192 U. S. 190, this court adjudged the following proposition, viz:

> "A contract made in New York, for the sale of goods to be delivered and stored in New York on arrival from a foreign port is a New York contract governed by the laws of New York even though the buyers be residents of another state."

In that case, the facts showed that the sellers Crossman & Brothers were residents of New York City, that a contract of sale was made in that city between them and the firm of Lurman & Company, who were residents of Baltimore, Maryland, and who were purchasers of certain coffees.

In the opinion at page 198, this Court by Mr. Justice White, says:

> "It is insisted that, even although it was in the power of the State of New York to legislate for the prevention of fraud and deception by forbidding the sale of the adulterated food products, such prohibition could only operate upon contracts made within or intended to be executed within the state, and as the contract here in controversy was not of such character, therefore the law of the State of New York was erroneously held to control. This proposition was based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the City of New York was referred to in the contract merely

> as the port of entry. * * * The contract of sale was made in New York; the storage and delivery in the City of New York was therein provided for. It was clearly, therefore, a New York contract and governed by the laws of New York."

Here we have another instance where the court is required to determine the question of *lex loci contractus*, but where the court, did not consider the residence of the parties as having any influence or significance in the determination of the question.

In all of the cases which we have cited and generally in cases that might be cited, the parties to the contract where the contract is one involving the question of *lex loci contractus* reside in different states. The question of *lex loci contractus* does not arise ordinarily where the parties to the transaction are purely domestic, that is, where the parties live in the same community and where the contract is made and executed in the place of their residence. The question generally arises where parties are citizens of different states, and because of the nature of the transaction they make the contract in a state other than the one where they both, or one of them, at least, reside.

In the case at bar, the insurance company had a residence in Missouri, which was acquired by the permission which it obtained to do business in Missouri under Missouri laws. So far as the insurance company is concerned the cases are the same as if the New York Life Insurance Company had been incorporated in Missouri, and the transaction of the business in these two cases in Missouri, by Mr. Head, was the same as if he had resided in Missouri, for the reason that he had the same right to come into Missouri and do business without a special permit as the New York Life Insurance Company had to come into Missouri and do business under and with a special permit.

Very much of the business in our day and time that is transacted in any state is between persons who are neither residents or citizens of that state. All interstate contracts and transactions are of that character. Indeed, the business of a state at the present time which is purely intra-state is a small portion of the volume of its business. However, all contracts are deemed to be made with reference to some law, and the unvarying rule on this subject, apart from real estate transactions, is that contracts are deemed to be governed upon the question of validity and interpretation by the laws of the state where they are made. No other rule is practical. It would be impossible as respects all contracts made between citi-

zens of different states, to make a rule governing them by the laws of the state of the residence of the parties. They have no common residence.

In this case, as we have seen, the New York Life Insurance Company is a resident of Missouri. Mr. Head was a resident of New Mexico. The contracts were made in Missouri. That cannot be denied. Now if the contract is to be deemed, notwithstanding it is physically made in Missouri, to have been made where the parties reside, then was it a Missouri contract where the New York Life Insurance Company had its residence, or a New Mexico contract, where Mr. Head resided. The rule is, we repeat, that the contract is to be deemed governable by the laws of the state where it is actually and physically made. If it be said it is competent for the parties to provide in the contract the state whose laws shall govern the contract, as was done herein, we answer that while that is sometimes done where that stipulation does not conflict with the laws of the state where the contract is actually made, it is not competent, according to the rulings of the courts, for parties to make a contract in Missouri contrary to the laws of that state, which enter into the contract, and provide in defiance of the laws of Missouri that that contract shall be governed by the laws of New York, Massachusetts, Oregon or California. If, for example, a citizen of Kansas and a citizen of Illinois were to come into Missouri and make a note for five thousand dollars, payable at the usurious rate of interest of ten per cent per annum, and secure that note by a chattel mortgage on a bunch of cattle in Missouri, it would not be competent for those parties to stipulate either in the note or in the chattel mortgage, that the contract should be governed by the laws of some other state where the transaction would be valid and where the chattel mortgage would not be void as in Missouri. Such a chattel mortgage would be absolutely void in Missouri, under the interest laws of Missouri, and neither that chattel mortgage or any contract made in its execution, extension or renewal would be valid. For the same reason neither the stipulation in the policies in these cases providing for the government of the contract by New York laws, or the stipulation in the loan contract made pursuant to and in execution of each of these same policies and likewise providing for the governing of that contract by the laws of New York, can control. The laws of Missouri having entered into and constituted a part of the original policies in these cases then became a part of those policies.

Apart, however, from the foregoing considerations and citations, we submit that the contention of counsel of the insurance company to the effect that Missouri laws do not apply in cases where the policy-holder is a non-resident of the State of Missouri, would, if sustained, involve a violation of that part of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of its laws. The concluding clause of Section 1 of Article 14 of the Amendment to the Constitution of the United States, reads as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. Head was in Missouri when the contracts in these cases were made. He was within the jurisdiction of the State of Missouri. Counsel contend that he is not entitled to the same protection of the insurance laws of Missouri as he would have been had he been a resident of the State of Missouri.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356-369, this Court adjudged the following propositions:

> "A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the Constitution of the United States, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying, or of the propriety of the place selected, for the carrying on of the business.
>
> "An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances.
>
> "The guarantees of protection contained in the Fourteenth Amendment of the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to difference of race, of color, or of nationality.
>
> "Those subjects of the Emperor of China who have the right to temporarily or permanently reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws."

In the body of its opinion in the case, at p. 369, this court used the following language:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, wthout regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. *It is accordingly enacted by Sec. 1877 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.* The questions we have to consider and decide in these cases, therefore, are to be treated as involving the right of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

In the case of *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S., 205, l. c. 209, this Court says:

> "Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed."

However, in the cases at bar, counsel of the New York Life Insurance Company solemnly insist that, although the circumstances of the making of these contracts by Mr. Head with the Insurance Company were "under similar circumstances and conditions" as if he had been a resident of Missouri, still he cannot have the benefit of Missouri insurance laws because he resided in New Mexico and not in Missouri.

In the case of *Duncan* v. *Missouri*, 152 U. S. 377, this Court adjudged that:

> "Due process of law, and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the case of *Frazer* v. *McConway & Torley Co.*, 82 Fed. 257, the United States Circuit Court for the District of Pennsylvania adjudged the following propositions:

> "The Pennsylvania law of June 5, 1897, imposing on every employer of foreign-born unnaturalized male persons over 21 years of age a tax of three cents a day for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employes, deprives the latter of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> "The equal protection of the laws declared by the Fourteenth Amendment of the Constitution, and enforced by the laws of the United States, is not confined to citizens, but secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances."

The opinion in the case only covers two and a half pages, and seems to be a very brief and concise statement of the law applicable to that case arising from the above provisions of the Fourteenth Amendment.

In the case of *Templar* v. *Barber's Board of Examiners*, 131 Mich. 254, the Supreme Court of Mich. adjudged the following proposition:

> "The provisions of Sec. 5 of the Barber's License Law (Act No. 212, Pub. Acts 1899) that no alien shall be entitled to a certificate is repugnant to the Fourteenth Amendment to the Federal Constitution, as denying the equal protection of the laws."

So, in *Steed* v. *Harvey*, 18 Utah, 367, the Supreme Court of the State of Utah adjudged the following:

> "The provision of the Fourteenth Amendment to the Constitution of the United States declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, secures to every person within the jurisdiction of the state, though not a citizen or even a resident, the protection of its laws equally with its own citizens and entitles him to the same remedies."

The case of *Pearson and wife* v. *City of Portland*, 69 Me. 278, was an action to recover damages, by the plaintiff, Mrs. Pearson, for injuries from a defective way in said City of Portland. The

plaintiff, Mrs. Pearson and husband were residents of Cuba and had no residence in the State of Maine. They only had a residence in Maine for temporary business purposes. It was claimed by the City of Portland that the action of the plaintiffs was barred because of a statute of the State of Maine, which read as follows:

> "No person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country."

The Supreme Court of Maine, in expressing its opinion of this statute, used the following language:

> "The only question we find it necessary to consider is whether this act is constitutional. We think it is not. It is in conflict with the 14th amendment of the United States Constitution, which declares, among other things, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' By the general statutes in force in this state at the time of the passage of this act (and still in force), every person sustaining an injury, in person or property, through any defect or want of repair, in any highway, townway, causeway or bridge, could recover for the same, in an action on the case of the town, city or county whose duty it was to keep the way in repair. R. S. c. 18, Sec. 65. This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects everyone alike. The act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril, and without that protection which the law affords to all others. They may be citizens of the United States and of this state, and within its jurisdiction at the time of injury; still, they are denied redress, denied 'the equal protection of the laws,' on account of the condition of the law of a foreign country, for which they may be no more responsible than they are for the color of their eyes or the color of their skins. The denial might as well be based on race or color

as upon the law of a foreign country; for the parties to be affected by it may be as powerless to change the one as the other. The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the state, it must remain in force for the protection of all others similarly situated.

The plaintiff was within the jurisdiction of the state at the time of her injury."

In the cases at bar, it appears that Mr. Head was in the State of Missouri when these contracts for policies in these two cases were made. Besides, the opening paragraph of Sec. 1 of Article 14, provides that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or inflict any law which shall abrogate the privileges or immunities of citizens of the United States."

The applications for these policies which are made a part of the policies, recite that Mr. Head was born in the State of Missouri. This fact gives him the rights of the above quoted opening paragraph of Sec. 1 of Article 14.

III.

Sections 5856 and 5858 at pages 1385 and 1386 of Volume 2 of the Revised Statutes of Missouri, 1899, in the chapter and article relating to life insurance, and copied in our preceding statement, were in force when these policies were issued in 1894, and those sections of the law became and were and are a part of the policy sued on. It follows that all provisions and terms of the policy in conflict with those statutes are void.

According to the rule of said Section 5856, the policies sued on, had a net value at the time of Mr. Head's default in 1905 which continued it over four years thereafter. About a year thereafter he died. According to the statutes of New York, relied upon by defendant, neither policy had any present value in the year of 1905 at the time of Mr. Head's default, but that result is obtained under the laws of the State of New York which provide for computing and including in the computation by which that result is reached, the loan of $2270. The officers of the company in New York,

however, all agree that if that loan indebtedness is not included in the computation the policy had a value at the time of Mr. Head's default in 1905 sufficient to continue it far beyond the period of his death, for the full amount of the policy. It is not seriously contended that the loan indebtedness could be included in making the computation under the Missouri statute. Said Section 5856 provides as follows:

> "It (the policy) shall be subject to the following rules of commutation, to-wit: The net value of the policy when the premium becomes due and is not paid shall be computed on the American experience table of mortality with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value *any notes or other indebtedness to the company given on account of past premium payments on said policy issued to the insured*, such indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance, for the amount written on the policy." This section is copied in full in our foregoing statement.

The only indebtedness under the statute which can be computed or taken into consideration in arriving at the net value of the policy, is indebtedness on "account of past premium payments" on notes given on account of past premium payments.

This section of our statute was fully considered and finally construed and determined by the Supreme Court of the state, in the case of *Cravens* v. *Insurance Co.*, 148 Mo. 583, affirmed by this court in *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389, and also in the case of *Smith* v. *Mutual Benefit Life Insurance Co.*, 173 Mo. 329, and also *Burridge* v. *Ins. Co.*, 211 Mo. 158-178.

In the Smith case it was explicitly adjudged by the Missouri Supreme Court, as follows:

> "In applying the net value of the policy to paying for extended temporary insurances, loans made to the assured by the company on the policy cannot be deducted from the net value of the policy. If the amount of the assured's indebtedness 'on account of past premium payments' is deducted from the net value of the policy, and the balance if applied to the payment of premiums will extend the policy beyond the date of the assured's death, the company cannot shorten that extended period by deducting the loans it has made to the assured. The Missouri statute authorizes no such deduction."

It was also held in that case, that:

> "An express agreement in the policy, *or subsequently*, that loans made the insured may be deducted from the net value of the policy in applying that value to extended temporary insurance, will not authorize such deduction, because the statute does not permit such a contract."

It was also held in that case that:

> "The statute has no concern with the relation of borrower and lender between the insurance company and the policy-holder, except when it relates to money borrowed from the company to pay premiums."

All of the premiums in these cases were paid as they became due, down to April, 1905. Then when the default of 1905 occurred, the company held no note or indebtedness of Mr. Head for premiums, and there was no premium due and payable except that for 1905 amounting to $425. The loan note included one premium of $425 and another sum of $310, the same amounting with interest to the sum of $841.70, the sum mentioned in his testimony by Mr. Reynolds, and deducting this amount Mr. Reynolds showed that the policy had a net value sufficient to carry it far over four years. This evidence is uncontradicted (Mary E. Head, Record pp. 31, 42, 101; Richard G. Head, Jr., Record p. 49).

IV.

It follows from the foregoing that plaintiffs in these actions were entitled to the judgments given as prescribed in said Section 5858 of the Revised Statutes of 1889, also copied in our foregoing statement, for the full amount of $10,000, the amount of each policy less the amount of the loan of $2270 and interest, and less the premiums of $425 each for 1905 and 1906, with interest as provided by that section. This result will be obtained by adding together the credits of the $2270 and the two premiums of $425 with interest to July 6, 1906, when the policies should have been paid, and then computing interest at six per cent on the balance from July 6, 1906, to the date of the finding and judgments in these actions.

V.

To the contention by the defendant that plaintiff Mary G. Head is not entitled to a judgment because of the claim that there was an election to take a paid-up policy, we answer that, notwithstanding there was a request made by the deceased and plaintiff in that action for a paid-up policy, yet that request was not complied with by defendant. No paid-up policy, as required by and under Section 5857, was ever issued by defendant. The defendant does not claim to have ever issued a paid-up policy. Under that section of the Missouri Statute, in order for defendant to claim the benefit of a bar to a recovery in this action by said plaintiff under Section 5856, on the ground of a paid-up policy, the defendant must make it clear and must have established that Section 5857 was complied with by the defendant issuing a paid-up policy under circumstances which had the legal effect of extinguishing the old policy.

The concluding proviso of Section 5857 is, that the old policy shall be surrendered and legally discharged at the parent office of the company. That statute contemplates the issuance of a new policy in lieu of the old one. That was not done in this case. The old policy did not cease to have force and effect. No new paid-up policy was issued. The defendant does not claim that anything done by it, or by the parties, with respect to the paid-up policy, was done under or pursuant to Section 5857 of the Mo. laws of 1889, relating to a paid-up policy.

It cannot be claimed by defendant that the request not complied with by the insurance company, of the plaintiff and her father for a paid-up policy, had the force and effect under the Missouri statute of abrogating the old policy, or that it had the same or a similar effect as the issuance of a new policy. The defendant claims and claims constantly and persistently, that all it did with respect to a paid-up policy was done under the contract of the parties. Claiming that that contract, as the defendant does, had force under and by virtue of the laws of New York, we submit that the defendant cannot occupy in this case an inconsistent attitude. It cannot claim that this contract is a New York contract governable by the laws of that state, in one breath, and at the same time claim that that contract has force and effect also under the conflicting laws of Missouri.

We claim that the contract is governable throughout by the laws of Missouri. We claim that there never was a paid-up policy

in this case, because the laws of Missouri respecting paid-up policies were not complied with. And it was one of the clear, distinct, positive propositions adjudged by the Missouri Supreme Court in the Cravens case, which was affirmed by this court, that there was no paid-up policy in that case, because the said statute of Missouri in regard to paid-up policies was not complied with.

In that case, the trial court gave a judgment as upon a paid-up policy and refused to give a judgment as for extended insurance under the next preceding section of the statute; but the Missouri Supreme Court reversed that judgment, holding that the judgment of the trial court based on the paid-up policy section of the statute, was erroneous and that the plaintiff was entitled to the full amount of the policy under the next preceding extended insurance section.

What was decided by the Missouri Supreme Court in that case, is the precise judgment given in these cases. We contend for the judgments for the full amounts based on the extended insurance section of the statute.

It is contended by defendant's counsel that the application for a paid-up policy by the plaintiff and her father, was an election by them to take paid-up insurance. Even if this is conceded to be so, still that election does not bind the plaintiff, because it was disregarded and held by the defendant not to be binding upon it. In other words, at the time when defendant could have made that election available by issuing a paid-up policy in compliance with the paid-up policy Missouri statute, defendant refused to do so. The evidence shows that the plaintiff and her father did not know what amount they would be entitled to if a paid-up policy were issued, when they made the application therefor. They were in ignorance on the subject. Where a party makes an election in ignorance of their rights, the election is not binding, especially where that election is not acted upon by the opposite party. Again, election in order to bind a party must bind both parties. It stands upon the same basis as an estoppel. These propositions have been repeatedly adjudged by the courts.

Johnson-Brinkman Co. v. *Bank*, 116 Mo. 574.
Trimble v. *Wollman*, 71 Mo. App. 467, l. c. 485.
Bowman v. *Leckey*, 86 Mo. App. 47, l. c. 63.
Standard Oil Co. v. *Hawkins*, 74 Fed. 395; 20 C. C. A. 468.

In view, therefore, of the ignorance of the plaintiff and her father of the amount to which plaintiff was entitled on a paid-up policy, and in view of the fact that defendant at the time when it could have accepted the request for a paid-up policy, refused to issue one under the Missouri statute, and since elections must mutually bind both parties, the defendant never became bound in this case by the provisions of the Missouri statute regarding paid-up policies, and it results that the rights and obligations of these parties must be determined by the preceding section of the statute in regard to extended insurance. This view of the case that the paid-up policy statute of Missouri does not apply results, we repeat, from the fact that the defendant never issued a paid-up policy under that section of the statute.

The amount of $89 which is tendered by the defendant is not the amount due as upon a paid-up policy under the Missouri statute, but is claimed to be the amount due as upon a paid-up policy under the New York statute, which does not apply to this case. We repeat that the defendant cannot say that it issued a policy for the amount that plaintiff was entitled to under the Missouri statute. The time has gone by when the defendant can avail itself of the provisions of the paid-up policy statute of Missouri, by issuing a paid-up policy under that statute for the amount due. On the evidence of Mr. Reynolds, a paid-up policy under the Missouri statute less the present worth of the indebtedness would have entitled the plaintiff to about $1,500.00. The words "net reversionary value" of debts for premiums employed in the paid-up policy section means the present worth of debts payable at some future time.

It is contended by defendant that, to ascertain the amount of the paid-up policy under section 5857 of the Missouri Revised Statutes of 1889, which provides for a paid-up policy, the company would have the right and option to deduct the loan indebtedness of $2270 or the present value of that indebtedness.

We do not assent to this proposition. Under the decisions of the Missouri Supreme Court in the Cravens, Smith and Burridge cases, a loan indebtedness pure and simple cannot be considered in determining the rights of the parties under our insurance laws. There is no ground for saying that a different construction in this respect should be given to Section 5857 than that which the courts have given Section 5856 of the Revised Statutes of 1889. Sections 5856, 5857 and 5858 are all statutes in *pari materia* and must be considered and construed together. Considering those statutes

together, the undoubted result of them all is to exclude from computation or consideration under all of those sections, any and all indebtedness by way of loans merely. The phrase in Section 5857 consisting of the words, "*All indebtedness to the company on account of such policy,*" means the same as the phrase in Section 5856 consisting of the words, "*Any notes or other indebtedness to the company given on account of past premium payments on said policy issued to the insured.*" The two clauses of the two sections mean the same thing. There is no reason for saying that the word "debts" or "indebtedness" in one section means one set of debts, while in the other section it means another set of debts. *A debt by way of a loan is not "an indebtedness to the company on account of the policy."*

Since, therefore, the insurance company did not during the lifetime of Mr. Head avail itself of the provisions of the paid-up policy Missouri statute, being Section 5857 of the Revised Statutes of 1889, it cannot now claim that the plaintiff is confined to a judgment for such amount as would be due if the defendant had availed itself of said paid-up policy statute by issuing a paid-up policy thereunder. This point does not arise and is not made in the Richard G. Head, Jr., case.

VI.

It is claimed by defendant's counsel that a different result follows in this case because at each time that a loan was made, what is called a new agreement was made by these parties. It cannot be denied that under the decisions the agreement of the parties at the time of the making of the policies making them New York contracts, must give way to the statutes of Missouri. But the same result follows from the making of any new agreement, especially where contemplated by the policy. This point was expressly adjudged in the case of *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Mo. 329, l. c. 341, 342, 343.

In that case the policy was issued June 10, 1884. Afterwards in 1896, the parties made an amendment to the policy, which amendment is to be found at pp. 337-338 of the opinion in that case. It was expressly held in that case that the amendment was without force.

On this point the court, in its opinion, at p. 341, used the following language:

"And if the parties could not in the beginning place themselves out of the policy of the law, *they could not by an amendment to the contract do so.* There is a great deal of technical learning in the subject of life insurance and our lawmakers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company and for that reason have written into such contracts some provisions which *the parties to them cannot avoid.* We hold, therefore, that the provisions of our statutes could no more have been avoided by the amendment to the policy in 1896, than by the original policy. And we hold, also, that the statute declaring that in ascertaining the net value of the policy it shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on such policy issued to the insured, which indebtedness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy,' does not mean that indebtedness incurred by the assured for money borrowed from the company may also be deducted. The statute means only what it says, that indebtedness on account of past premium payments shall be deducted."

It follows that amendments which are claimed to have been made in these cases to the policies sued on, by either of the loan agreements, is without force and effect as against the Missouri statutes. Besides, the amended statute of 1903, relied upon by defendant (Session Laws of Mo. 1903, p. 208) only applies to policies thereafter issued. It has no application to the policy in this case. Nothing is better settled in Missouri than that all statutes operate prospectively, and never retrospectively.

Blumm v. *N. Y. Life Ins. Co.*, 197 Mo. 513.
State v. *Mer. Co.*, 184 Mo. 160, l. c. 185.

See also as precisely in point:

Burridge v. *New York Life Ins. Co.*, 211 Mo. 158, l. c. 178; 109 S. W. Rep. 560.
Christensen v. *N. Y. Life Ins. Co.*, 152 M. A. 551; 134 S. W. Rep. 100.

In these cases the terms of the policies provided and stipulated for the subsequent loans made in 1904. Therefore the loan contract was not an independent contract.

Burridge v. *Ins. Co., supra.*

The Missouri statutes hereinbefore copied, regulating loans in cases of default became a part of each policy when issued, and the loans provided for in each policy were subject to those statutes. It was therefore the right of Mr. Head and of his children to make the loans accordingly, and the company had no more right or power in the new so called loan contracts to make the policies New York contracts, than it had in the policies themselves.

VII.

The propositions maintained by defendant go upon the basis of payment of the premium at the time of making application for insurance. The cases cited by defendant's counsel were cases where such payment of the first premiums were made at the time of sending in the application and there being a death shortly thereafter, the question in those cases was whether the premium having been paid in advance the insurance took effect from the time of the mailing of the policy addressed to the policy-holder or from the time of actual delivery to him. There was no question in any of those cases as to whether the contract was a contract of one state or another as in cases at bar. The rulings of the courts in those cases seem to have been that, where the applicant for insurance did all that he was required to do to make a binding contract on his part at the time of making the application, by sending along with the application the advance premium, and the insurance company, on the receipt of the application and the advance premium, manifests the company's acceptance of the contract by mailing to him a policy, then the contract takes effect from such acceptance upon the basis that the minds of the parties have met.

But that is not this case. Here, the assured, Mr. Head, had not paid his advance premium in either of these cases, at the time of making or sending forward the application. He made the application for insurance through Mr. Magill, who acted as solicitor under defendant's Kansas City branch office. There was one application for both insurances. That application was delivered to Mr. Magill, the solicitor of the insurance company in Kansas City, Mo. Mr. Magill took Mr. Head's note for both advance premiums at the time of application. That note was made payable personally to Mr. Magill. Afterwards, when the policies came back to the office in Kansas City, they were delivered, as the uncon-

tradicted evidence shows, to Mr. Head, or to his attorney, and the premiums were then paid to Mr. Magill and the contracts then took effect. The contracts had not taken effect before because the premiums were not paid until the policies were delivered to Mr. Deatherage, who was Head's attorney. Cotemporaneously with the delivery of the policies to Mr. Deatherage for Mr. Head, Magill, the agent, paid the premiums, and Mr. Head paid Magill by giving a draft or check on the Drumm Commission Company.

On these facts, counsel have not produced any authority that the policies took effect as contracts until their delivery at Kansas City and the payment by Magill for Mr. Head of the premiums. A glance at the policies will show that there was no binding contract against or for Mr. Head until he actually paid the premiums.

On the first page of the policy in each case, we have the following language:

> "This contract is made in consideration of the written application for this policy and of the agreements, statements and warranties thereof which are made a part of this contract, and in further consideration of the sum of $425 to be paid in advance, and of the payment of a like sum on the 3rd day of April in every year thereafter during the continuance of this policy."

This is a paragraph from the policy in each case, on the first page thereof, and demonstrates that there was no insurance in this case until the payment of the advance premium. The first premium was to be paid in advance upon the issuance of the policy. Such is the language contained in the policy.

Again, on the second page of the policy, under the head of "Benefits and Provisions Referred to in this Policy," is, among others, the following provision:

> "No agent has power in behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation on information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated. All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be made through agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and counter-signed by such agents. If

> a premium is not thus paid on or before the day when due, then, except as hereinafter otherwise provided, this policy shall be void and all payments previously made shall remain the property of the company."

These provisions demonstrate, if demonstration be necessary, that the policies did not take effect from the time they were mailed from New York City, for the reason that the advance premium was not paid by Mr. Head in either case until the receipt in Kansas City of the policies.

The provision on the first page of each policy is as follows: "The benefits and provisions placed by the company on the next page, are a part of this contract as fully as if recited over the signatures hereto affixed." The clause above cited is from the benefits and provisions referred to in the policy, and is thus made a part of the policy.

It will be observed from the policy that the company did not receive payment by Mr. Head in either case, of the advance premium, but the contract recites the written application and then provides that if the advance premium be not paid the contract of insurance shall be void, or in other words, without any effect. Even if the policies had been delivered to Mr. Head without the payment of the premiums, the policies would never have taken effect or been valid and binding contracts, for the reason that the above clauses quoted from the policy indicate that if the advance premium was not paid the policy should be without effect, or, in other words, should not take effect.

Again, in Mr. Head's application for this insurance, and on page 3 of the policy in each case, among the agreements which are stipulated between the defendant Insurance Company and Mr. Head, is the following:

> "4. That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said Company or its authorized agent during my life time and good health."

It follows from this and the other above quoted provisions of the policy, that the policies in these cases did not take effect when mailed from New York City here, for the reason that at that time Mr. Head had not paid any premiums. He had given a personal note to Mr. Magill, but that was not payment. The giving of a note is not payment unless it is so expressly agreed. *Segrist*

v. Crabtree, 131 U. S. 287-289, 22 Am. & Eng. Enc. of Law, (2d Ed.), 555. As between Mr. Head and the New York Life Insurance Company, neither of the advance premiums in these cases were paid until they were paid by Mr. Magill for Mr. Head. The giving of Mr. Head's note personally to Magill was not payment. Mr. Magill did not have the authority to bind, and did not bind the Insurance Company by taking that note. The giving of the note by Mr. Head to Mr. Magill was conditioned upon the acceptance by the Company in New York of the insurance. The giving of that note was wholly without effect as between Mr. Head and the Insurance Company, and as between Mr. Head and Magill, the giving of that note was actually conditioned upon the granting of the insurance by the company in New York. If the Company should send policies to the agents in Kansas City and Magill should make payment of the premium therein for Mr. Head, then he would owe Magill the amount of that note; but if, on the other hand the Company should reject the application for the insurance and should not send the policies, then Mr. Head would not owe Magill anything. The contracts therefore did not take effect until Magill made the cash payment to the branch office of the defendant Company in Kansas City, and when those payments were made, the contracts for the first time took effect, and they took effect in the State of Missouri where the premiums were paid and not in the State of New York.

The proposition above stated that the policies in these two cases took effect as contracts when the premiums were paid in Kansas City, is amply supported by the authorities cited. In these cases the policies were not mailed to Mr. Head but to defendant's branch office at Kansas City, Mo.

VIII.

The proposition contended for that the amendatory act of March 27, 1903, to be found at page 208 of the Missouri Session Laws of 1903, applied to these cases, cannot be sustained. The rule that statutes operate prospectively and not retrospectively prevents that statute from applying to either of these policies or either of these cases. If applied retrospectively, then said statute as to these policies is void.

State ex rel. Hacussler v. *Greer*, 78 Mo. 188.
Leete v. *Bank of St. Louis*, 115 Mo. 184.

This latter is the case in which the Missouri Supreme Court held that the married woman's act of 1873 did not apply to marriages or affect the marital rights of husbands in cases where the marriages took place prior to said married woman's act. It was decided in that case, that the application of said married woman's act of 1873, to the marriages then in existence or to rights which had then accrued would be violative of the constitutional provision prohibiting the enactment of a law retrospective in its operation.

We submit that these cases must be decided without any reference to said act of 1903.

Burridge v. *Ins. Co.*, 211 Mo. 158-178.
Christensen v. *Ins. Co.*, 152 M. A. 551.

IX.

Did the loan contracts of 1904 and 1905 change the policies of insurance in these cases, as contended by defendant's counsel?

The policy of these Missouri statutes, being the three sections applicable to these cases by which extended insurance is provided for, is based upon the relation of the parties, the insurer and insured. In these cases at bar, three distinct relations existed between the parties, one was the relation of insurer and insured; another was the relation of lender and borrower of money; another relation which existed between the parties was that of pledgor and pledgee. Each and all of these three relations are fiduciary in their character, and the parties in contracting with one another stood very much in the same plight as a guardian and ward, a principal and an agent, an attorney and a client, two partners in a partnership, and other kindred fiduciary relations. The relation of these parties of pledgor and pledgee was the same in substance as the relation of mortgagor and mortgagee, which relation involves the idea of trust and confidence.

The statutes regulating the subject of usury are based upon this fiduciary dependent relation of borrower and lender, and proceed upon the theory that the legislature as well as courts of equity may properly protect the dependent subordinate parties by providing a rate of interest which the parties may not change by contract. So in the case of mortgagor and mortgagee, pledgor and pledgee, there exists in each case an equity of redemption which the parties may not contract away. Even in the case of a mortgage where the parties stipulate against the right of redemption, the

right of redemption still exists under the law, and it is not competent or possible for the parties to contract away the right of redemption in the cases of mortgages and pledges.

This was expressly ruled and decided at a very early day by the Missouri Supreme Court, in the case of *Wilson* v. *Drumrite*, 21 Mo. 325. The proposition decided in that case was that, "Every conveyance, intended as a security for money, is a mortgage, and no agreement of the parties at the time can take away or limit the right of redemption."

In that opinion, at p. 329, Judge Leonard, speaking for the Supreme Court, said:

> "It may be admitted that the defendant refused to take a mortgage, and that it was expressly agreed between the parties that there should be no reconveyance of the land except upon the condition of punctual payment at the times indicated; yet, the conveyance was given and taken as security for money to be paid, and therefore for that very reason is, by the law of the land, a mortgage—a redeemable conveyance, *and it was not in the power of the parties to make it otherwise.*"

Sometimes it has been held in mortgage cases that, upon the maturity of the indebtedness it is competent for the mortgagor to sell the mortgagee the property mortgaged, in full satisfaction of the debt. But even in that class of cases, the courts have held, in view of the fiduciary and dependent relation of the parties, that there must be a full consideration for the transfer and conveyance and unless there be such, any conveyance and transfer of the mortgagor to the mortgagee is void.

It can hardly be contended that these loan contracts were valid. There are several reasons for this. The right to extended insurance, accrued under Sec. 5856 of the Insurance Co. hereinbefore copied away back in 1896 after two annual premiums had been paid. After the payments of two premiums as contemplated and required by the extended Missouri insurance statute, then the right to extended insurance under that Missouri statute, which was a part of these policies attached in favor of Mr. Head and plaintiffs and as we have seen that right attached away back in 1896, two years after the issuance of these policies. The right to extended insurance in these cases, we repeat, accrued under the extended insurance statute, Vol. 2, R. S. Mo. 1889 Sec. 5856. Not only that but long after Mr. Head and plaintiffs acquired the vested right to extended in-

surance following the two first payments, he practically got in default about the time of these loan contracts. Of course when he got in default in paying his premiums, then the vested right to extended insurance acquired after two payments became still more complete and consummate. That was his condition when these loan contracts were made. The dependent condition of Mr. Head had then become more intensified and more deserving and more requiring that protection which originally was given by courts in this class of cases, but which is afforded by the Missouri statutes with respect to these insurance contracts. Mr. Head had the right initiate to extended insurance and to the payment of these policies in full at and 8 years before the time of these loan contracts.

For these reasons the statutes of Missouri governing these insurance policies subsisting between parties sustaining fiduciary and dependent relations, cannot be changed by the parties. The reason and policy of those statutes become perfectly apparent when it is considered that these loan contracts were not made until after the insurance had run for over ten years and at a time when Mr. Head had become an old decrepit man and practically insolvent. Then the insurance company steps in and endeavors to defeat the policy and positive provisions of the Missouri statutes applicable to the cases, by making him a loan of $2270 on each policy and in this way the insurance company endeavors to pay off an indebtedness of $10,000 by $2270. On the principle, that a mortgagee of a mortgage upon the maturity of the mortgage indebtedness cannot thus deprive the mortgagor of his property without paying full consideration for the property conveyed, certainly upon like principle, an insurance company ought not to be permitted to pay a $10,000 indebtedness in the way that the defendant insurance company sought to do in these cases. For this reason it is that contracts like these loan contracts are held to be void, just as a usury contract is void notwithstanding the contracts of the parties, and just as contracts between mortgagor and mortgagee which do away with the right of redemption, are held to be void.

The principle which is applicable to this class of cases is well expressed by this court, in the case of *Villa* v. *Rodrigues*, 12 Wall. 339. In that case this Court in its opinion used the following language:

> "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous

and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears of poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

But counsel for defendant company seem to proceed upon the theory that these insurance companies, after their insured become old and decrepit, sick and necessitous, and need more than at any other time the protection of the law, may contract away rights of the insured so as to practically deprive them, after long years of payment of premiums, of their rights under their policies. Counsel seem to think that insurance companies, notwithstanding the relation which subsists between them and their dependent policy holders, have the unlimited right to make contracts as they please. According to this contention, a contract obtained by a guardian from his ward is a valid contract. According to the same contention, a contract with reference to the subject matter obtained by an agent from a principal, is perfectly valid. According to this same idea, a contract obtained by an attorney, with respect to the subject matter of his relation to his client, is valid.

The freedom of unrestrained power to contract has been more than once denied by the Courts. Thus, in the case of *State ex rel.* v. *Firemen's Fund Ins. Co.*, 152 Mo. 1, it was held that there is no such thing in civilized society as the unrestrained power to contract. That was a case of *quo warranto* to oust certain insurance companies for the violation of the anti-trust laws of Missouri, and this so-called unrestrained power to contract was denied.

So again, in the case of *State* v. *Cantwell*, 179 Mo. 245, the Mo. Supreme Court held as follows:

> "The right of parties to contract is subject to the limitations which the state may lawfully impose in the exercise of its police power. This right does not deprive the state of its authority to interfere *where the parties do not stand upon an equality*."

In that case the so-called unrestrained right of contract was held subject to the act of the Missouri Legislature which applied to a class of underground laborers who searched for minerals and engaged in mining.

In the opinion in that case, at p. 268, the Missouri Supreme Court, quoting from the language of the United States Supreme Court in the case of *Holden* v. *Hardy*, 169 U. S. 366, repeated the following language:

> "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In order words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self interest is often an unsafe guide, and the Legislature may properly interpose its authority."

This principle again found expression in the case of *Karnes* v. *Ins. Co.*, 144 Mo. 413. That was a suit on a fire insurance policy. The policy in that case contained the provision that "no suit against this company for a recovery of a claim under this policy shall be sustainable in any court unless begun within one year from the date of the fire." And it was held that that provision in the policy was in conflict with Section 2394 R. S. 1899, declaring all parts of a contract void that limit the time in which a suit thereon may be brought.

It was also held in that case that,

> "Citizens do not have the absolute right to make all contracts they deem proper. The state may prohibit such contracts as contravene the policy of its laws."

It was further held that,

> "Such a statute as the above is not unconstitutional, and a suit brought more than a year after the fire on an insurance policy containing such provision, is not barred, if not otherwise barred by the statute of limitations."

In that opinion the court said:

> "It cannot be claimed that parties have the right to make any and all contracts they deem proper. The state has made and may properly make many regulations that will restrict this right. For instance, we have usury laws and their validity is unquestioned. Parties are not permitted to insert certain conditions in insurance contracts which would be perfectly legitimate, but for statutory prohibition. Yet the courts sustain these provisions and declare ineffectual any attempt by contract to evade or nullify the statute. *Equitable Society v. Clements*, 140 U. S. 226; *Havens* v. *Ins. Co.*, 123 Mo. 403; and see, also, *Henry Co.* v. *Evans*, 97 Mo. 47."

The foregoing views and citations are in harmony and accord with the decisions of the Missouri Supreme Court in the case of *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Mo. 329. The decision in that case is an explicit adjudication which has been more than once repeated by the court, that the relation of borrower and lender in this class of cases is entirely different from the relation of insurer and insured, and that contracts between the parties as borrower and lender cannot be procured to defeat the policy of the laws in regard to insurance contracts, whether those loan contracts are made at the time of the issuance of the policy or made thereafter. As to the policy of these insurance laws, the remarks of the court in that case are so complete and so conclusive that we copy the following extract from the opinion of the Missouri Supreme Court in that case:

> "We are satisfied that the Missouri statute, Section 5856, Revised Statutes 1889, govern in this case, and this brings us to the consideration of the point on which the defendant seems chiefly to rely, and on which the case turned in the mind of the learned trial judge, that is, as defendant contends, that in estimating the net value of the policy for extended temporary insurance, Section 5856 authorizes the insurance company to deduct not only the amount of loans made to the assured for payment or part payment of premiums to keep the policy alive, but also cash loaned him to be otherwise used as he might see fit. The argument is made for defendant that unless the company be allowed to so deduct the amount it would have no se-

curity for the loan. The defendant has the policy transferred to it as collateral security for the loan, and in this instance at least, the policy is ample security because the defendant will be allowed to deduct the whole amount of the debt due the plaintiff on the policy. Of course, if the assured should live beyond the period of temporary insurance, the policy would become extinct and the defendant would have only the personal liability of the estate of the assured to depend on. But, as the assured might die within the extended period of the policy, we can not say that there was no security at all. Such policies doubtless have some commercial value available in the market as collateral securities, varying, of course, according to the circumstances of the case. But we have nothing to do with that. Such considerations can have no influence in construing this statute. If the defendant advanced the $485.14 to the assured believing that it would have the right to deduct it from the net value of the policy in case of non-payment of premium, before applying it to the payment of extended temporary insurance, whether because it so interpreted our statute or because it considered that the terms of the policy as amended superseded the provisions of the statute, it did so under a mistaken view of the law. Our law deems the subject of life insurance one that requires a special protection, and in this particular, it has provided that the policy-holder shall have the benefit of the extended temporary insurance specified in Section 5856, 'anything in the policy to the contrary notwithstanding.' Therefore, though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply, still they would apply. And if the parties could not in the beginning place themselves outside the policy of the law, they could not by an amendment to the contract do so. There is a great deal of technical learning in the subject of life insurance and our lawmakers have proceeded upon the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them can not avoid. We hold, therefore, that the provisions of our statutes could no more have been avoided by the amendment to the policy in 1896, than by the original policy. And we hold, also, that the statute declaring that in ascertaining the net value of the policy it 'shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebted-

ness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy,' does not mean that indebtedness incurred by the insured for money borrowed from the company may also be deducted. The statute means only what it says, that indebtedness on account of past premium payments shall be deducted."

Undoubtedly wherever courts of equity may adjudge the invalidity of contracts of parties occupying dependent and fiduciary relations, the Legislature as possessing the power of *parens patriae* may enact such invalidity in advance.

The decision of the Missouri Supreme Court, and which was affirmed by the United States Supreme Court, in the case of *Cravens* v. *New York Life Ins. Co.*, 148 Mo. 583, 178 U. S. 389, is another explicit decision that the legislation of Missouri upon which the rights of insured in that case and the rights of the insured in these cases were upheld, is constitutional. This sort of legislation free from the power of the parties to change by contract, has also been upheld in other states.

Mutual Life Ins. Co. v. *Twyman*, 92 S. W. 335.

That was a decision by the Kentucky Court of Appeals in March, 1906.

In the opinion in that case the court, at p. 337 said:

"In *N. Y. Life Ins. Co.* v. *Curry & Bro.*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297, the authorities on the subject were reviewed by this court. The facts of that case were that one George Anderson, who was the owner of a paid-up life policy of insurance upon his life for $630, in the N. Y. Life Ins. Company, payable to his estate borrowed of that company $130, and assigned his policy as collateral security for its payment, upon the condition that in case of default in any payment of interest on the loan, the company might declare the debt due, cancel the policy and apply its cash surrender value to the payment of the insured's note and interest. In discussing this provision of the contract between the parties, this court in the opinion by Judge O'Rear said: 'That is pure and simple a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral, if he promptly fails to pay in-

terest on the debt. The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid ($630) at his death. The $130 was borrowed from appellant since that completion of the contract. The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement upheld. This is said to be because on the prompt payment of the premium depends the mutuality of the contract and the ability of the insurance company to meet its obligations. But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are merely penalties for the non-payment of borrowed money, they are not allowed. They lead to, and themselves are unconscionable oppressions of the unfortunate.' After quoting with approval the case of *St. Louis Mut. Life Ins. Co.* v. *Grigsby*, 10 Bush, 310; *Montgomery* v. *Phoenix Ins. Co.*, 14 Bush, 51; *Northwestern Ins. Co.* v. *Fort's Admr.*, 82 Ky. 269; *Mut. Life Ins. Co.* v. *Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343; *Manhattan Life Ins. Co.* v. *Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. Rep. 393, and holding that they are in line with the case *supra*, the opinion concludes as follows: *"In the case at bar there is no conceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations or individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the non-payment of the interest upon the loan is void."*

When the loan agreements were made the parties thereto did not thereby sustain the relation of insurer and insured, but such contracts and such relation were that of borrower and lender of money, the same as if the insurance company had been a bank and the insured had been a borrower. It goes without saying that a banker loaning money to an insured on a policy could not by

the terms of the loan agreement incorporate into the terms of the policy, provisions different from the policy, or contrary to the law. If the banker could not do it, then the insurance company could not do it. This was expressly decided in the Smith case in the 173rd Mo. l. c. 342, in the following language:

> "This statute does not undertake to regulate all business transactions that may occur between the life insurance company and a policyholder; it only puts its hands into the contract of life insurance; it deals only with the subject of insurance and premium, and if the parties choose to assume toward each the relation of borrower and lender of money other than to pay the premium, this statute has no concern with that relation. * * *
>
> "The borrowing of money for a purpose other than the payment of a premium and the assignment of the policy as collateral security for the loan, put the parties, as to that item, in a new relation to each other. By virtue of the policy, and the premium, the parties stood in the relation of insurer and insured, and the law of insurance governed them in that relation, *but when the insured borrowed money of the insurer and assigned the policy as collateral security, the law governing their rights in that respect is the same as if he had borrowed money from a bank and given it the same collateral. In such case, the bank would have been entitled to a lien on the proceeds of the policy* BUT NOT TO APPROPRIATE TO ITSELF THE PREMIUM WHICH WAS TO KEEP THE POLICY ALIVE."

X.

Defendant may rely on Section 5859 of the Missouri Revised Statutes of 1889. This claim was not presented to or considered by the Missouri Supreme Court as by its opinion will appear (Record Mary E. Head, pages 141-144). It was not claimed there that the endorsement of a paid-up policy for $89.00 on her policy brought the case under that section. The statute reads as follows (Vol. 2 Rev. Stat. of Mo. 1889, page 1386):

> "Sec. 5859. THE FOREGOING PROVISIONS NOT APPLICABLE, WHEN. The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in Section 5857, or if the legal holder of the policy

shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable" (R. S. 1879, Sec. 5986).

It may be claimed that her original policy No. 599690 was in the language of the foregoing section "Surrendered to the company for a consideration adequate in" her judgment as "the legal holder thereof."

This section received a legislative construction in 1895 (Mo. Session Laws 1895, pages 197-198), by the addition thereto of the following proviso, viz: *Provided, that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual payments thereon, but in all instances where three annual payments shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section* 5856 *of this article.* This proviso having a legislative construction of said section of the act of 1889, must be read as a part of that act as originally framed from the time of its enactment. In Vol. 1 Fed. Stat. Case, p. 46, it is said:

"SUBSEQUENT STATUTES IN *Pari Materia.* In one of the early cases Chief Justice Marshall said that 'if in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject accords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.' The doctrine was reaffirmed by Mr. Justice Wayne, speaking for the Supreme Court: *'If it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.'* "

The following is the same statute as said section 5859 with the proviso of 1895 (Vol. 2 Rev. Statutes Mo. 1899, pages 843-4):

Sec. 7900. FOREGOING PROVISIONS INAPPLICABLE, WHEN. The three preceding sections shall not be

applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional surrender value, at least equal to the net single premium, for the temporary insurance provided for hereinbefore, or for the unconditional commutation of the policy for non-forfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then and in any of the foregoing cases this article shall not be applicable: PROVIDED, *that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual payments thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article*" (R. S. 1889, Sec. 5859, Amended Laws 1895, p. 197 amended).

In this connection it should be remembered that Mr. Head had only paid two premiums on this policy when the legislative interpretation in the form of that proviso was made in 1895; that nine of his eleven premium payments were made thereafter, and that the loan of $2270 was made nine years after that proviso. The testimony of the insurance expert, J. B. Reynolds (Record Mary E. Head case, pp. 31, 42, 101, 35, 43, 44, 102) that the amount of paid-up insurance due on this policy was $2873.08, and that deducting the reversionary value of the loan for premiums the paid-up policy should have issued for $1567.51, should also be borne in mind.

Moreover, it should be remembered that this is not an ordinary life policy with premiums payable during the life of the insured, but is a life policy whose payments are limited to twenty years and that therefore the amount of paid up policy is governed by that clause of the paid up policy statute of Missouri (Sec. 5857), which provides:

> "and in case of a limited payment life policy or of a contained payment endowment policy payable at a certain time or at death, *it shall be for an amount* bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid,"

and that therefore a paid up policy should have issued in this Mary E. Head case for eleven-twentieths of $10,000 or $5500,

(since eleven of the twenty premiums had been paid before default), less the reversionary value of that part of the loan which covered premiums on the policy. The expert Reynolds testifies that that reversionary value was about $1300, and deducting that from $5500 we have $4200 as the net amount of the paid up policy in this case under the statute.

The Missouri Supreme Court decided that the amount for which a paid up policy should have issued could not be paid or satisfied by a paid up policy for $89, and this would be true if the application for and issue of a paid up policy had taken place under said agreement clause of section 5859, and not under Section 5857 providing for a paid up policy. Even under section 5859 the parties could not agree for a paid up policy less than the amount provided for by section 5857. The legislative construction made by the proviso makes that clear. It was not designed by the agreement clause of section 5859 to abrogate the common law rule that liquidated money demands can not be paid by less than their amount. It was not designed that a fixed vested demand for a paid up policy of $4200 could be extinguished by a paid up policy for $89. But what was done in this case must be ascribed to section 5857 and not to section 5859. It was not the case of a surrender of policy to the company "for a consideration adequate in the judgment of the legal holder" under said section 5859 but was a demand for and an attempted issue of a paid up policy. The application was made after default and therefore after the amount for which the paid up policy should issue, had become fixed by said section 5857. The application reads as follows: (Record Mary E. Head case p. 126)

"May 3, 1905.

"The New York Life Insurance Co. is hereby requested to endorse policy No. 599,690 for $599,690, this being the amount of paid up insurance payable in accordance with the terms of the policy."

Richard G. Head,
Insured.
Mary E. Head,
Beneficiary Assignee.

Wm. G. Haydon, Witness.

This paper was the initiation of all that followed. It was a mere demand for paid up insurance and it did not open up or lead to any adjustment, contract, settlement or agreement of any kind.

It simply and solely called for and demanded a paid up policy as the applicant was entitled to by virtue of the laws of Missouri, which were a part of the policy, referred to in the application. On the day of the date of that demand defendant's cashier telegraphed to Mr. Head as follows: (Record Mary E. Head case p. 125)

> "I also have your wire advising me that you have signed the application for paid up policy which trust will come in due course.
>
> Yours very truly,
>
> Geo. R. Tyner,
> Cashier."

On May 4, 1905, Tyner, Cashier, wrote to Mr. Head as follows (Record Mary E. Head case, p. 125):

> "May 4, 1905.
>
> Mr. Richard G. Head, Las Vegas, N. M.:
>
> Dear Sir:
>
> I beg to acknowledge receipt of your draft for $57.00 completing the cash payment of your policy No. 599,691 for which I enclose receipt. I also have your request for paid up policy No. 599,690, which goes to the Home Office today for attention.
>
> Yours very truly,
>
> Geo. R. Tyner,
> Cashier."

On the same day Mr. Tyner transmitted the application for paid up insurance to the Home Office in New York saying in his letter of transmission (Record Mary E. Head, case p. 126):

> "Kindly endorse the policy for whatever amount of paid up insurance is available and notify me in regard to the same. I am returning renewed receipt this date."

This shows that when the demand was made and afterwards forwarded to the Home Office it was not known what the amount of the paid up policy should be. It is true that in the blank space in the application for the paid up policy where the amount was to be inserted the number of the policy was by mistake written but when or where are not known. Of course those figures were not taken by any one as indicating the amount. What was done by defendant in New York is shown by the testimony of Arthur R. Grow the actuary of defendant at page 95 to 98 of the record in

the Mary E. Head case. That testimony shows that Mr. Grow, acting under the New York law and wholly ignoring the Missouri law figured out that after deducting from the paid up insurance the whole amount of the loan, there was a balance of $89 which was endorsed on the policy (Record Mary E. Head case p. 25). This result having been thus obtained the policy with the endorsement was sent to Cashier Tryner who wrote to Mr. Head as follows (Record Mary E. Head case, p. 128):

"June 12, 1905.

Richard G. Head,
Las Vegas, N. M.

Dear Sir:

I beg to enclose herewith policy No. 599,690 duly endorsed for the amount of paid up insurance available on same after cancelling the indebtedness against the policy.

Yours very truly,

George R. Tryner,
Cashier.

On these facts we submit that there was not as contemplated by said section 5859, a surrender of the policy to the company; no consideration was agreed upon or paid by the company; and it was not within the contemplation of either party that they were making a contract or agreement for or to do anything or for any purpose.

The paid up policy section, 5857 has this language:

> "and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of a policy may *demand of the company, and the company shall issue its paid up policy*"

for the amount provided for in that section. This language is a demonstration that the parties in this case were not acting under the agreement clause of section 5859. The transaction was a *"demand"* for a paid up policy by plaintiff followed by a refusal of the company to issue the paid up policy provided for by section 5857 which refusal left the extended insurance section 5856, the section controlling the case.

In *Burridge* v. *N. Y. Life Ins. Co.*, 211 Mo. 158-178-179 the Missouri Supreme Court in construing said section 5859 said:

> "That section plainly contemplates that the relation of insurer and insured may be brought to an end if the insurer complies with its provisions and the policy is surrendered for a consideration adequate in the judgment of the holder."

In this case of Mary E. Head the relation of insurer and insured was not brought to an end by the endorsement of the $89 on the old policy. On the contrary the re-delivery of the old policy with that endorsement was intended as a paid up policy in continuation of the old one, and the relation of insurer and insured was not canceled. The above Burridge case is precisely in point on this branch of the case as it is also on other points. In the case of *Paschedag* v. *Life Ins. Co.*, 155 Mo. App. 185, 199, 200, which was a case similar to this Mary E. Head case the St. Louis Court of Appeals in its opinion said:

> "It is next argued that, by the loan contract and the surrender of the policies to the defendant at the time the loan was made, it appears the insured accepted the proceeds of the loan as an adequate equivalent in his judgment for his rights in the premises and therefore as he was the sole beneficiary (the policy having been payable to his personal representatives) its subject-matter is relieved from the operation of the non-forfeiture provisions of the statutes by virtue of section 7900, which provides, among other things, that the three preceding sections as to non-forfeiture, etc., shall be inapplicable if the policy shall be surrendered to the company 'for a consideration adequate in the judgment of a legal holder thereof.' *But, of course, this involves, too, a transaction where the parties contemplate a cessation of the insurance contract at the time. By the express provision of the statute, the insured may surrender the policy and terminate the relation of insurer and insured for any consideration which in his judgment is adequate therefor, but the consideration must be given by the company for such a surrender and not for some other purpose. The provision of the statute referred to is without influence here for the reason the matter of surrendering the policy in the sense of the statute for an adequate consideration was not in contemplation of the parties.* Indeed, it is clear the parties did not intend to terminate the relation of insurer and insured by this transaction, for insured reserved the right to pay the loan and redeem the pledge of the policies, and defendant proceeded to notify him when the subsequent payment fell due as though the insurance were still in force and not then surrendered for such a consideration as was deemed adequate in the judgment of the insured. See, in this connection, *Burridge* v. *Ins. Co.*, 211 Mo. 158, 109 S. W. 560

> Where the transaction is denominated by the parties as a loan and the pledge of the policies and their dealings touching the matter manifest they did not intend the policy was thereby surrendered in the sense of the statute referred to for a consideration adequate in the judgment of the insured, the court is not justified in saying the transaction was a surrender. For a case directly in point see *Raymond* v. *Ins. Co.*, 86 Mo. App. 391."

In said case of *Raymond* v. *Ins. Co.*, 86 Mo. App. 391-396, the St. Louis Court of Appeals in its opinion said:

> "The court was also right in refusing to declare there was any evidence that the policy in suit was surrendered or sold to the company for a full consideration to the holder. The terms of the contract and note utterly disprove this notion. They show conclusively that the transaction evidenced by them was merely a loan, and that the policy was delivered as collateral security upon an express agreement that the surplus of the collateral security, or in the words of the contract, 'the balance of the surrender value beyond the amount of the loan,' on non-payment of the note, should be paid over to plaintiff and her husband. *This language completely negatives the idea that there was any present sale or surrender in toto of the policy at the time the loan was effected.*"

This case was decided in 1900 which was four years before these transactions.

If it be said that plaintiff Mary E. Head was called upon to protest against the amount of paid up insurance on the receipt of the old policy back with the indorsement, it suffices to say that neither she or her father knew the amount, and the company did not call for or expect a protest or objection from either of them. There was nothing in the transaction which involved the idea of a negotiation, and after the making of the demand for paid up insurance, the Heads were not expected to say or do anything. It was the duty of the company on its own peril to issue the policy for paid up insurance for the correct amount, otherwise the paid up policy was void.

On these points we call attention to the decision of the Springfield Mo. Court of Appeals in *Gillen* v. *New York Life Ins. Co.*, 161 S. W. Rep. 667-672 where the court in its opinion says:

> "It must be granted, however, that the defendant had no right to impose on the insured any such settlement, and it will

be seen that when it wrote to him in effect that it had foreclosed the loan and applied the net value of the policy to the payment of the loan, thus canceling both the policy and his personal indebtedness to it, *the letter in no wise suggested that he had any right to object and decline any such settlement. This letter was not designed to give the insured any freedom to contract with reference to this matter. It gave no figures or amounts and no information as to the method of computation used or how it arrived at the result that the policy is of no value. It is based on the assumption by the defendant that the loan agreement and pledge of the policy gave the defendant company the absolute right to apply the net value of the policy in payment of the loan and that it had exercised this right and therefore the 'policy has no further value.' The letter does not call for any choice or answer, and the only thing suggested that the insured could do is to have protested against the arbitrary action of the company. The contention of the defendant is that the failure of the insured to so protest works an estoppel by acquiescense equivalent to a voluntary agreement that the policy be surrendered in consideration of the cancellation of the loan indebtedness. It must, however, be borne in mind that the insured was under no obligation to make any choice or request in order to obtain the extended insurance. The law gave him this benefit unless he voluntarily chose and assented to the other alternative of at that time surrendering the policy for a consideration adequate in his judgment.*

"In thus charging against the insured against a duty to protest against the company's action in this respect, defendant imputes to him and the beneficiary a better knowledge of their rights under the policy than was possessed by the company. We will accord to the company an honesty of purpose and that it honestly believed the loan agreement and pledge of the policy gave it a right to thus cancel the policy, although, as we have seen, it was mistaken in this. As said in *Smith* v. *Insurance Co., supra,* the insured is not presumed to have the technical knowledge in reference to life insurance contracts possessed by the experienced officers of such companies; and, if they did not know the rights of the respective parties under this policy contract, how can the assured be charged with sufficient knowledge of his rights thereunder on which to base a protest? *Logic and common sense demand that before there is a duty to protest against any action of another the party protesting must have sufficient knowledge of his rights to justify such protest and which suggests to him his duty to make protest."*

This case is similar to this Mary E. Head case and is precisely in point. On the point of estoppel the court in its opinion in that case further said:

> "Nor where there any sufficient facts pleaded to constitute an estoppel. A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby—that he was induced to do or refrain from doing something to his injury. Whatever may be the facts, the defendant did not plead that it refrained from collecting the personal obligation arising from the loan agreement because of its reliance on such debt being fully paid by the application of the net value of the policy to such purpose. *Miller* v. *Anderson*, 19 Mo. App. 71, and cases cited. *Osborn* v. *Court of Honor*, 152 Mo. App. 652, 133 S. W. 87 *Northrup* v. *Coulter*, 150 Mo. App. 639, 649, 131 S. W. 364."

There is no plea of estoppel in this case such as is suggested above or otherwise (Record Mary E. Head case, pp. 10-13). The answer of defendant explicitly pleads the transactions on this branch of this case as being paid up insurance and does not anywhere hint at the idea that there was a contract or agreement for the surrender of the policy for "a consideration adequate in the judgment of the legal holder."

On this point of estoppel we also call attention to paragraph 5 of the opinion in this case of the Missouri Supreme Court (Record Mary E. Head case, page 148).

See also the testimony on this point of plaintiff Mary E. Head copied in full in our foregoing statement of facts preceding herein this brief and argument (Record Mary E. Head case, p. 58).

Acts which cannot be agreed to because contrary to law, cannot be indirectly worked out or validated by waiver or estoppel and neither waiver or estoppel exists where there is an absence of knowledge, and especially where fiduciary relations exist.

The decision of the court in the case of *Christensen* v. *N. Y. Life Ins. Co.*, 160 Mo. App. 486 arose under the revised statute of 1899 and not under that of 1889. The policy in that case was issued December 21, 1901, *id.* p. 490. The court in its opinion in that case did not notice or consider the construing proviso annexed to the statute in 1895. Besides in that case as appears from the opinion (page 492):

> *"No demand was made by the insured for a paid up policy by written request or otherwise after the date of default at any time."*

This fact materially differentiates that case from this. The opinion in that case is in defiance of all the Missouri insurance statutes and court decisions which we have cited. It holds that an estoppel may be based on an unlawful act.

There is a material difference between Sec. 5859 of R. S. 1889, which applies to this case, and Sec. 7900 R. S. 1899. The statute of 1889, Sec. 5859, has the word "cash" after the word "unconditional" and before the word "surrender", in the third and fourth lines, and in the sixth and seventh lines, it has the further following words: "For which the net value shall be equal to that provided for in Sec. 5857." The above words which are in Sec. 5859 R. S. 1889 are not contained in the corresponding section No. 7900 R. S. 1899. Said words "cash" and "for which the net value shall be equal to that provided for in Sec. 5857" contained in the statute of 1889, mean that the new policy which may be issued under said Sec. 5859 must be for the unconditional cash surrender value, and it must be for non-forfeitable paid-up insurance "for which the net value shall be equal to that provided for in Sec. 5857."

The testimony of the expert Reynolds shows that on May 3, 1905, when the paid-up insurance was demanded, the net value of the policy in this suit would purchase new insurance for $2873.08. Said sum of $2873.08 or $4200 is the amount for which Mary E. Head was entitled to insurance under either Sec. 5857 or Sec. 5859 R. S., 1889. But there was no attempt or pretense on the part of the Insurance Company that the company was complying with either Sec. 5857 or Sec. 5859 of the Missouri Statutes of 1889, by its endorsement on Miss Head's policy.

The request was made on a blank of the company which referred to the amount of "paid-up insurance payable in accordance with the terms of the policy." In all that the company did, both in the preparation of the form for the application and in the endorsement of $89 on the policy, the laws of New York and not the laws of Missouri were sought to be complied with.

Said Sec. 5859 does not apply to this case because the policy sued on does not, as said Sec. 5859 expressly provides:

> "contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in Sec. 5857."

Said Sec. 5859 further provides as follows:

> "Or if the legal holder of the policy shall within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then and in any of the foregoing cases this act shall not be applicable."

In this case, Miss Head did not surrender the policy and accept from the company another form of policy.

As we have seen the company did not comply with the paid up policy Missouri statute, because of insufficiency of the amount endorsed on the policy. It follows that as there was no compliance in this case by the Insurance company, either with the provisions of Secs. 5857 or 5859 in the revision of 1889, or with the provisions of Secs. 7898 and 7900 of the revision of 1899, plaintiff is entitled to recover for the amount of the policy, less the indebtedness for which it received credit in the judgment below in accordance with the non-forfeitable provisions of Sec. 5856 R. S. 1889.

XI.

It should be remembered that the preceding point does not apply to the Richard G. Head, Jr., case No. 255.

XII.

The suggestion that the proceedings of the New Mexico Probate Court show that as to the Richard G. Head Jr., case No. 255, the loan agreement was a New Mexico contract, is unfounded. The question is where the original policy and loan contract were made. The company agreed in the policy to make the loan of $2270 if borrowed within eleven and fifteen years of the 20 years during which the premiums were to be paid. The loan was made according to the agreement therefor in the policy for $2270 in the eleventh year. There was no necessity for the new additional policy loan contract required by the company at the time of the loan, for the company by reason of the loan agreement in the policy was bound to make the loan without a new agreement. The agreement in the policy for the loan, provided that the loan should run with interest at 5 per cent; that the policy should be assigned as security for the loan and that the Heads as borrowers "may

elect" when the loan should be payable. The agreement in the policy for the loan was perfect and needed nothing to complete it. There was nothing in the loan agreement in the policy which made either the policy or loan subject to New York laws, and the requirement of the company, by such a provision in the additional so called loan contract made in 1894 was as wrongful and illegal as it would have been if made in the policy. The Heads as borrowers had the right to the loan without any such stipulation, by virtue of the loan agreement in the policy. The proceedings of the New Mexico Probate Court in the Richard G. Head, Jr., case No. 255, were had for the purpose simply of empowering his father as his guardian to receive the money due on the loan contracted for in the policy. And since the loan agreement was in the policy, it follows that the loan agreement was a Missouri contract with the policy of which it was a part.

XIII.

We submit that we have fully answered defendant's contentions in the foregoing. Throughout defendant's brief it speaks of defendant company as a non-resident of Missouri. As we have seen it is not material whether it was a citizen or resident of that state, but although it was incorporated in New York, by coming into Missouri and obtaining a license to do business therein, it acquired a domicile and residence there the same as if incorporated therein, and by so doing it agreed to be bound as to all policies issued through its Kansas City, Mo. branch and to be governed by the laws of Missouri which issued the license defendant applied for. It asks the court now to help it break that contract with Missouri. It has done business in Missouri for 20 years and more under its license to do business in that state under its laws, and when Mr. Head contracted with it, in Missouri he was not doing business with defendant as a party "temporarily" within Missouri as counsel suggest at page 16 of their brief. The loan agreement was not a new agreement. The loan agreement in the policy was carried out by the Heads making their loan notes, and the pledges of their policies to the company and the simple payment by it to them of the loan money. The only agreement or contract whose obligation is sought to be impaired in these cases is defendant's contract with the state of Missouri made by defendant as a condition, and as the consideration, for its license, to comply with

its laws, in the transaction of its business at its branch agency in that state. The only stipulation in the new so called loan agreement, not in the loan agreement in the policy, was the one inserted by the company that the laws of New York should govern, but this would have been illegal in the policy, and as that was a Missouri contract, defendant had no right to impose that unlawful condition in carrying out and executing the loan contract which was a complete contract as made in the policy. The breach of the loan contract as contained in the policy would have been actionable in favor of the Heads, if the company had refused to make the loans as provided for therein. The rights of the Heads to the loans made were derived from and under the loan contracts in the policies which were Missouri contracts. The new so called loan agreement was wholly unnecessary and did not change the rights of the parties.

XIV.

The motion to dismiss the writ of error in each case for want of jurisdiction should be sustained, or the judgment in each case should be affirmed.

Respectfully submitted,

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